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UNITED STATES DISTRICT COURT
IN THE DISTRICT OF IDAHO

- - - - - x Case No. 1:12-cv-00560-BLW
SAINT ALPHONSUS MEDICAL CENTER - :
NAMPA, INC., TREASURE VALLEY : Bench Trial
HOSPITAL LIMITED PARTNERSHIP, SAINT :
ALPHONSUS HEALTH SYSTEM, INC., AND : **Closing Arguments**
SAINT ALPHONSUS REGIONAL MEDICAL :
CENTER, INC., :
Plaintiffs, :
vs. :
ST. LUKE'S HEALTH SYSTEM, LTD., and :
ST. LUKE'S REGIONAL MEDICAL CENTER, :
LTD., :
Defendants. :
- - - - - : Case No. 1:13-cv-00116-BLW
FEDERAL TRADE COMMISSION; STATE OF :
IDAHO, :
Plaintiffs, :
vs. :
ST. LUKE'S HEALTH SYSTEM, LTD.; :
SALTZER MEDICAL GROUP, P.A., :
Defendants. :
- - - - - x

REPORTER'S TRANSCRIPT OF PROCEEDINGS

before B. Lynn Winmill, Chief District Judge
Held on November 7, 2013
Volume 19, Pages 3665 to 3870

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A P P E A R A N C E S

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<p style="text-align: right;">3669</p> <p>1 PROCEEDINGS</p> <p>2 November 7, 2013</p> <p>3 THE CLERK: The court shall now hear the closing</p> <p>4 arguments in Civil Case 12-560-S-BLW, Saint Alphonsus</p> <p>5 Medical Center, Nampa, et al., versus St. Luke's Health</p> <p>6 Systems, et al.</p> <p>7 THE COURT: Good morning, Counsel.</p> <p>8 MR. GREENE: Good morning, Your Honor.</p> <p>9 THE COURT: Before we start, Mr. Greene, I know</p> <p>10 you're chomping at the bit, but I'm going to take just a few</p> <p>11 minutes to lay out some thoughts or concerns I've got, which</p> <p>12 may give counsel some direction about some areas that I'm</p> <p>13 still -- you know, I will have to say that this is,</p> <p>14 undoubtedly, one of the most difficult cases that I think</p> <p>15 I've had to wrestle with. I can't think of a time when I've</p> <p>16 sat through a trial or even an evidentiary hearing and not</p> <p>17 at the end had a very clear fix in my mind as to what is the</p> <p>18 right answer. This case is difficult, plus I know the</p> <p>19 stakes are extremely high for not only all of the entities</p> <p>20 here, but even the community, and that makes the problem</p> <p>21 even that much more difficult.</p> <p>22 I'm going to lay out just a couple of comments and</p> <p>23 questions, and then -- I'm not asking any specific response,</p> <p>24 only to make you mindful of some things that are kind of</p> <p>25 nagging at me and that I -- and the first is -- and I guess</p>	<p style="text-align: right;">3670</p> <p>1 this is indirectly a question about the merger-specific</p> <p>2 benefits of the Saltzer deal, and that is: Is the</p> <p>3 Saltzer-St. Luke's deal necessary to achieve an integrated,</p> <p>4 risk-based healthcare delivery system?</p> <p>5 There's -- it strikes me, from the literature that I've</p> <p>6 read, the Berkeley Forum study and some other things that</p> <p>7 I've read that were part of the -- in the briefing and in</p> <p>8 the evidence presented -- that although there are some who</p> <p>9 are not certain, that the trend certainly is towards the</p> <p>10 integrated, risk-based healthcare delivery system as a model</p> <p>11 to help us get out of this almost catastrophic situation</p> <p>12 that we're headed towards in terms of healthcare costs.</p> <p>13 The question -- and I think it's a major question in</p> <p>14 this case. I don't think there's a whole lot of doubt that</p> <p>15 the acquisition itself has, to a substantial extent, brought</p> <p>16 together a pretty massive economic force in the healthcare</p> <p>17 market in Canyon County. Now, we'll talk about -- and I'm</p> <p>18 sure you're going to be arguing about how we define the</p> <p>19 market, but it seems to me that clearly is the case.</p> <p>20 What I think is -- the very serious problem is whether</p> <p>21 or not what might have been viewed five or ten years ago as</p> <p>22 having very substantial anticompetitive effects, whether our</p> <p>23 view today has to be very different because we have a</p> <p>24 different world we're not only in now, but we're facing in</p> <p>25 the future. And, therefore, I think that, to me, to at</p>
<p style="text-align: right;">3671</p> <p>1 least some extent, this case may well turn upon that</p> <p>2 question, as I posed it. So that's one thing I would like</p> <p>3 counsel to be mindful of as you're addressing the arguments.</p> <p>4 And kind of tied to that, and I think a second major</p> <p>5 question is one of remedy. Is there anything, is there any</p> <p>6 possibility of the court settling upon some intermediate</p> <p>7 remedy which would blunt the anticompetitive effects of the</p> <p>8 merger in today's world, in other words, the way that</p> <p>9 insurance contracts are currently negotiated and the market</p> <p>10 power that the merger will necessarily give St. Luke's and</p> <p>11 yet allow some form of a transaction to go forward and</p> <p>12 achieve, again, the integrated healthcare system that we</p> <p>13 have talked about. No one has proposed anything but a</p> <p>14 winner-take-all. And, of course, the difficulty here is</p> <p>15 that the winner-take-all approach means that someone is</p> <p>16 going to be injured as a result. Someone is going to suffer</p> <p>17 in some fashion no matter which way I come down. And, of</p> <p>18 course, I will do what I think is right without regard for</p> <p>19 that, but, of course, I have to be mindful of those</p> <p>20 concerns.</p> <p>21 And then I guess a third and final point, and we didn't</p> <p>22 talk a lot about the Kaiser Permanente experience, and I</p> <p>23 focus on that more than the Mayo Clinic, which I think are</p> <p>24 kind of the two models that have been cited as being</p> <p>25 examples of where there has been success in developing these</p>	<p style="text-align: right;">3672</p> <p>1 risk-based, integrated care systems. But from the briefing</p> <p>2 I noted, if I read it correctly, Kaiser Permanente has,</p> <p>3 roughly, 40 percent of the California healthcare market, and</p> <p>4 California, despite having pretty substantially above-</p> <p>5 average cost of living, has reduced healthcare costs, which</p> <p>6 does suggest, in broad brush, that there is something to the</p> <p>7 argument that integrated healthcare can result in decreased</p> <p>8 costs.</p> <p>9 And, actually, Mr. Greene, it's appropriate that you're</p> <p>10 up first because one of the questions I had was: How did</p> <p>11 Kaiser Permanente get 40 percent of the California market</p> <p>12 without FTC involvement? I would think, inherently, in some</p> <p>13 smaller markets that would have to be a much higher</p> <p>14 percentage, 60, 70 percent. And was that challenged or</p> <p>15 scrutinized by the Federal Trade Commission? Was it found</p> <p>16 to be acceptable despite the fact that it does result in a</p> <p>17 very concentrated market? And so I think that is something</p> <p>18 I would like counsel to at least address if it has any</p> <p>19 relevance.</p> <p>20 Now, there are a lot of other questions I may have as</p> <p>21 we go along. Those are three things that I thought I would</p> <p>22 just lay out because all three -- well, all four or five</p> <p>23 parties here or six parties -- I haven't added them all</p> <p>24 up -- may have some thoughts on those issues.</p> <p>25 Mr. Greene.</p>

<p>3673</p> <p>1 MR. GREENE: Thank you very much, Your Honor. Let</p> <p>2 me express my appreciation, and I'm sure the appreciation of</p> <p>3 all counsel here, for you sharing your candid perspectives</p> <p>4 on what the important questions for you might be.</p> <p>5 Certainly, for me, that's helpful guidance. I'm sure it</p> <p>6 will be true for others.</p> <p>7 Just a couple of housekeeping issues. I will be</p> <p>8 covering the general issues. My colleague Mr. Ettinger will</p> <p>9 be covering those issues focused more particularly on the</p> <p>10 private plaintiffs and, in light of your comments just made,</p> <p>11 Mr. Wilson will be covering remedy for us, so it will be</p> <p>12 one, two, three, but Mr. Wilson will be focusing</p> <p>13 particularly on precisely one of the questions.</p> <p>14 THE COURT: Mr. Wilson is the person, I guess, I</p> <p>15 was focusing on when I made those comments.</p> <p>16 MR. GREENE: One other additional housekeeping</p> <p>17 matter consistent with our prior practice; there are some</p> <p>18 AEO materials in my slide deck. There are four slides, so I</p> <p>19 will be asking Your Honor to darken the screen, but --</p> <p>20 THE COURT: Well, we won't need to clear the</p> <p>21 courtroom, I hope.</p> <p>22 MR. GREENE: No. That is -- I'm hoping I'm</p> <p>23 telling you, Your Honor, at least from our side of this, we</p> <p>24 don't think you need to clear the courtroom, particularly</p> <p>25 since this is --</p>	<p>3674</p> <p>1 THE COURT: Mr. Metcalf and I had that discussion</p> <p>2 before we came in. And I was just hoping that counsel had</p> <p>3 figured out a way to avoid sending anyone out of the</p> <p>4 courtroom.</p> <p>5 MR. GREENE: Very good.</p> <p>6 Let me turn to my closing argument, Your Honor.</p> <p>7 I think the fair question before us is what have we</p> <p>8 learned after four weeks of trial? We've heard dozens of</p> <p>9 witnesses. We've heard from expert witnesses. You've seen</p> <p>10 and deliberated on massive amounts of evidence. I think for</p> <p>11 plaintiffs, there are a handful of major high-level</p> <p>12 takeaways.</p> <p>13 The first is that this case is about power and money.</p> <p>14 This deal substantially increases concentration in an</p> <p>15 already highly concentrated market. It creates a strong</p> <p>16 presumption of anticompetitive effects under the antitrust</p> <p>17 laws. The deal combines the two largest providers of</p> <p>18 primary care patient services in the Nampa arena. It</p> <p>19 eliminates each other's closest competitor. So this is a</p> <p>20 situation in which my most important competitor I now buy,</p> <p>21 which is significant from an antitrust perspective.</p> <p>22 Overall, the documents, from our perspective, the</p> <p>23 testimony, and economic analysis all lead to a single</p> <p>24 conclusion, Your Honor, that this deal will increase the</p> <p>25 cost of care for the people of Idaho.</p>
<p>3675</p> <p>1 Secondly, apropos of some of the questions that</p> <p>2 Your Honor raised with us is that we also -- we also believe</p> <p>3 that this is a case that's largely about rhetoric versus</p> <p>4 reality. Our colleagues on the other side have been very</p> <p>5 articulate on this notion that there are these</p> <p>6 efficiencies -- Your Honor spoke to some of them -- but from</p> <p>7 our perspective, it just ain't so.</p> <p>8 The kinds of initiatives that they are pursuing</p> <p>9 represent broad national consensus on what is appropriate in</p> <p>10 healthcare. These kinds of things are being done across the</p> <p>11 United States, as Dr. Kizer spoke to Your Honor about. It's</p> <p>12 also national policy reflected in the Accountable Care Act.</p> <p>13 The over \$30 billion under the federal HITECH Act that have</p> <p>14 been committed to independent physicians, hospitals all</p> <p>15 across the nation to increase their ability to manage</p> <p>16 electronic medical records and to use that information in an</p> <p>17 effective, pro-consumer clinical way.</p> <p>18 So this is the policy of the United States. This is</p> <p>19 not something that's unique to St. Luke's; indeed, the</p> <p>20 Triple Aim they borrowed from Medicare. So the idea is a</p> <p>21 good one, but it is an idea that is broadly embraced by</p> <p>22 physicians, healthcare providers, and healthcare</p> <p>23 policymakers throughout the United States.</p> <p>24 Specifically --</p> <p>25 THE COURT: So part of what you're saying is that</p>	<p>3676</p> <p>1 it's not necessary to approve this merger because the</p> <p>2 momentum is so great in that direction it's going to happen</p> <p>3 anyway?</p> <p>4 MR. GREENE: I think that's right, Your Honor. I</p> <p>5 mean, certainly, that's our position, and I think when you</p> <p>6 unpack that, you see that the things that St. Luke's has</p> <p>7 spoken to as being positive, electronic medical records, for</p> <p>8 example, I think is a physical example of the new world of</p> <p>9 healthcare. In that new world, we treat populations as</p> <p>10 distinct from specific patients.</p> <p>11 So we heard throughout the trial the A1c measure, which</p> <p>12 is a measure of blood sugar, which is something that is</p> <p>13 important if somebody is close to or is a diabetic -- that</p> <p>14 is a specific quality metric that Medicare uses. Every</p> <p>15 doctor and hospital in the United States that is worried,</p> <p>16 that gets federal money, which is all of them, including</p> <p>17 St. Luke's and Saltzer, are now being asked to measure</p> <p>18 those -- measure that metric and treat patients consistent</p> <p>19 with what they see from those tests. It's embedded in the</p> <p>20 electronic medical records that they create. It's embedded</p> <p>21 in the requirements under the Meaningful Use doctrine. It's</p> <p>22 embedded in the Physician Quality Reporting System, which is</p> <p>23 yet another federal program that pays physicians</p> <p>24 specifically to do certain things and analyze data.</p> <p>25 We heard a great deal about WhiteCloud. WhiteCloud is</p>

<p>3677</p> <p>1 essentially a data management or data analysis system. You</p> <p>2 heard in this courtroom, Your Honor, that there are a</p> <p>3 variety of these kinds of systems. Dr. Kizer said -- ticked</p> <p>4 off six or eight in a nanosecond. You heard from Dr. Polk</p> <p>5 from Saint Alphonsus that they're using something called</p> <p>6 Explorys, very cool technology. It's basically platform</p> <p>7 indifferent. They can access EMR, they can access EMRs from</p> <p>8 across the Idaho space and use that information in order to</p> <p>9 analyze the healthcare data that they do have access to.</p> <p>10 This is our world of healthcare. This is a good thing</p> <p>11 for America, but it is not a unique invention of St. Luke's</p> <p>12 of Idaho. It just is not. So that context and</p> <p>13 those -- those forces are very much in play in this</p> <p>14 healthcare market and every healthcare market in the</p> <p>15 United States. So I think to identify St. Luke's as somehow</p> <p>16 a unique actor is to ignore, I think, what you heard in the</p> <p>17 trial and, I think, what we've seen with respect to what's</p> <p>18 actually happening in Idaho itself.</p> <p>19 For example, Dr. Polk also spoke to the fact that</p> <p>20 Saint Alphonsus interoperates with independent physicians.</p> <p>21 They also pay independent physicians for quality of care.</p> <p>22 That's also the case with Advocate, for example, in Chicago.</p> <p>23 Mr. Billings of St. Luke's, who you heard by video</p> <p>24 testimony, is actually originally from that system, and he</p> <p>25 was quite precise. Sure, we had independent physicians, we</p>	<p>3678</p> <p>1 had quality of care metrics, and we paid them if they hit</p> <p>2 those marks. So there is absolutely no requirement, none,</p> <p>3 to get to the kinds of things that Your Honor has spoken to</p> <p>4 that are important, which are ultimately -- I think you've</p> <p>5 identified some of the major goals, fundamentally, of the</p> <p>6 U.S. healthcare system, as we stand here.</p> <p>7 But let me turn to a bit more detail. At least from</p> <p>8 our perspective, from an overarching perspective, employment</p> <p>9 not a superior organizational model. Benefits of IT tools</p> <p>10 are not keyed to employment. St. Luke's and Saltzer can</p> <p>11 engage in risk-based contracting without the acquisition,</p> <p>12 either directly -- or in Saltzer's case either directly or</p> <p>13 by way of participation in various networks. The core</p> <p>14 theory, which we've heard about off and on, there is simply</p> <p>15 no real basis for that. Fundamentally -- and I think this</p> <p>16 is really one of our key points, Your Honor -- there is no</p> <p>17 evidence that St. Luke's prior acquisitions of physician</p> <p>18 groups have resulted in either higher-quality or lower-cost</p> <p>19 care. They have actually been engaged in a quite</p> <p>20 substantial acquisition boom over the last several years,</p> <p>21 and, simply, we've not seen much positive from that.</p> <p>22 Bargaining leverage. I think that Your Honor already</p> <p>23 spoke to your views about the power involved in this thing,</p> <p>24 so I'll go quickly here. But I think one of the major</p> <p>25 insights that I think we learned here, both from the payor</p>
<p>3679</p> <p>1 witnesses and from Dr. Dranove in particular, is that the</p> <p>2 way prices go up in this kind of a market is in the</p> <p>3 bargaining context. And in that bargaining context, it's</p> <p>4 the existence of an outside option. Mr. Crouch of</p> <p>5 Blue Cross spoke of that as the BATNA, the best alternative</p> <p>6 to a negotiated agreement. Dr. Dranove spoke about it more</p> <p>7 simply as the outside option.</p> <p>8 This case, if Your Honor allows this to go forward, is</p> <p>9 going to essentially eliminate a substantial outside option</p> <p>10 for payors in this market, which means, necessarily, and</p> <p>11 based on the history of these kinds of negotiations, that</p> <p>12 prices will go up in the form of reimbursement rates going</p> <p>13 up or the shifting of services from independent settings to</p> <p>14 hospital settings, which are more expensive. So I think</p> <p>15 that's really important.</p> <p>16 On the question of rhetoric versus reality, we do have</p> <p>17 one of the -- an independent physician who actually is a</p> <p>18 board member of St. Luke's, and in one of his emails:</p> <p>19 "Let's be realistic. Employing physicians is not achieving</p> <p>20 better costs; it's achieving better profit." So even</p> <p>21 internally, there is a lot of dissent on whether or not this</p> <p>22 acquisition wave, represented most recently by the proposed</p> <p>23 purchase of Saltzer, really is in the best interests of</p> <p>24 patients.</p> <p>25 We do believe that we have met our prima facie burden</p>	<p>3680</p> <p>1 in this case, Your Honor. This, as you know, is an exercise</p> <p>2 that involves determining markets. The two-dimensional</p> <p>3 situation we have here is that the adult PCP services from</p> <p>4 the perspective of the government plaintiffs is the right</p> <p>5 product market, and, from our perspective, the geographic</p> <p>6 market is Nampa. When you take those markets and examine</p> <p>7 the increases in concentration, we well exceed the</p> <p>8 thresholds under the law to create a presumption of</p> <p>9 illegality. Indeed, that presumption is breached by a wide,</p> <p>10 wide margin.</p> <p>11 We also believe, Your Honor, that looking fairly at the</p> <p>12 documents, books, records, and testimony that we have</p> <p>13 demonstrated there will be substantial competitive harm from</p> <p>14 this agreement.</p> <p>15 Section 7 of the Clayton Act, just very briefly,</p> <p>16 Your Honor, this is the operative law that we deal with.</p> <p>17 Three points here. One is this deals with an acquisition</p> <p>18 which has a competitive effect in any line of commerce in</p> <p>19 any section of the country, so primary care physician</p> <p>20 services, an appropriate product market, Nampa, an</p> <p>21 appropriate geographic market.</p> <p>22 This also embeds a very, very important policy judgment</p> <p>23 on the part of the Congress of the United States that the</p> <p>24 law should be used in a way to foreclose, to stop monopoly</p> <p>25 power, greater market power in its incipency. The</p>

<p style="text-align: right;">3681</p> <p>1 incipency standard is what is embedded in the statute and 2 its follow-on case law.</p> <p>3 One aspect of the incipency standard is this 4 presumption that we spoke to Your Honor about from 5 <i>Philadelphia National Bank</i>. This is the seminal examination 6 of what -- how a court should approach this. So the court 7 in <i>Philadelphia National Bank</i> says, "Specifically, we think 8 that a merger which produces a firm controlling an undue 9 percentage share of the relevant market and results in a 10 significant increase in the concentration of firms in that 11 market is so inherently likely to lessen competition 12 substantially that it must be enjoined in the absence of 13 evidence clearly showing that the merger is not likely to 14 have such competitive effects."</p> <p>15 That is the law. Defendants have actually tried to 16 muddy this, from our perspective. We did, of course, 17 examine with great care their proposed conclusions of law. 18 They appear to be suggesting that the court can kind of 19 glide past these cases and, essentially, use some sort of 20 rule of reason balancing test. That is simply not the law. 21 <i>Philadelphia National Bank</i>, of course, is the United States 22 Supreme Court.</p> <p>23 The law of this circuit is best exemplified, I think, 24 by <i>California versus American Stores</i>. This is a case that 25 involves supermarkets in Southern California. This is the</p>	<p style="text-align: right;">3682</p> <p>1 Ninth Circuit decision, which is quite crisp. And this case 2 ultimately went up to the United States Supreme Court and 3 was affirmed. Same structural analysis in recent healthcare 4 cases in the <i>Rockford Memorial</i> decision by the Seventh 5 Circuit also reflects this idea of a presumption followed by 6 an analysis rather than some sort of balancing -- a sort of 7 unbounded balancing test.</p> <p>8 Couple more examples I've mentioned: <i>American Stores</i>, 9 <i>H. J. Heinz</i> is also specifically to this point. And with 10 respect to <i>H. J. Heinz</i>, that uses the Herfindahl Indexes as 11 a way to determine and come to some conclusions about what 12 concentration looks like.</p> <p>13 With respect to the markets, there is no dispute, 14 really, I think between the parties on the fact that adult 15 PCP services is a distinct service market. Dr. Argue and 16 Professor Dranove agree on this. I think the real 17 interesting issues are in the area of geographic market.</p> <p>18 One of the questions that Your Honor adverted to, the 19 way we look at this -- I mean, the discipline that allows us 20 to sort out, from an econometric perspective, whether there 21 is a market. The way we proof a market, if you will, is 22 embedded in the horizontal merger guidelines we've talked a 23 lot about and also in the case law. The idea here is that 24 if a hypothetical monopolist in a chosen market could 25 increase prices by a small but permanent amount, generally</p>
<p style="text-align: right;">3683</p> <p>1 5 to 10 percent -- this is frequently referred to as the 2 5 percent test -- if a monopolist, someone who has all of 3 the market share in a chosen geographic market, can increase 4 the price and sustain that price, then you have an 5 appropriate geographic market.</p> <p>6 We believe that when you look at the actual evidence, 7 there are multiple, consistent points of support for Nampa, 8 and Nampa alone, as the appropriate market. It is 9 undisputed evidence, from our perspective, that patients 10 demand care locally. That is supported by those that serve 11 them -- health plans, health payors, if you will, including 12 St. Luke's, interestingly, recognize the importance of 13 including Nampa PCPs in network. This is also supported by 14 the analytics that were done by Dr. Dranove. There is a 15 clear dividing line between Nampa and the rest of the 16 Treasure Valley with respect to where people choose to get 17 care.</p> <p>18 With respect to the points about patients wanting to be 19 treated locally, I mean, it just makes sense that if you're 20 ill, you don't want to drive 20 miles to get care and then 21 drive 20 miles back. If your child is ill, you don't want 22 to have the kid with the earache in the back of the car 23 going 20 miles and then going 20 miles back. This is 24 recognized by Dr. Argue. This is recognized by John Kee, a 25 vice president for St. Luke's. And it's also recognized by</p>	<p style="text-align: right;">3684</p> <p>1 Nancy Powell, the former Saltzer CFO, she being a mom. If 2 they have to take a child out of school, they don't want to 3 spend their entire day -- her day trying to get to a 4 physician's office.</p> <p>5 At the end of the day, Your Honor, this whole notion of 6 market definition is one of what's reasonable, what are the 7 reasonable alternatives for real people. I mean, we have 8 provided, as has the other side, an enormous amount of 9 econometric information, but the real question is where 10 would people go, reasonably, to get care if the prices in 11 this market went up 5 percent?</p> <p>12 This slide I find absolutely fascinating. This is from 13 Dr. Seppi, and he is -- he asked the question of, well, 14 you're at St. Luke's and you have doctors in Boise, 15 Meridian, and Eagle, in Ada County, why can't you just use 16 those doctors to serve people in Nampa? This is precisely 17 the question that Dr. Argue finds a completely different 18 answer to. But with respect to Dr. Seppi, he says patients 19 would like to see physicians in their immediate vicinity. 20 So he is rejecting, in this statement, that Boise, Meridian, 21 and Eagle provide -- provide a basis for concluding that 22 Nampa should not be the market.</p> <p>23 I think we need to close this one, Your Honor.</p> <p>24 Similarly, we have payor testimony. One of the -- the 25 payor on the left on your screen was obviously quite</p>

<p style="text-align: right;">3685</p> <p>1 articulate in terms of what would be required. Nampa PCPs</p> <p>2 are critical to a viable network product and,</p> <p>3 interestingly -- interestingly, it's St. Luke's when it is</p> <p>4 considering what it wants it do in terms of its own</p> <p>5 insurance product; it says it needs local providers in</p> <p>6 Nampa.</p> <p>7 All right. I think we can undo the screen, Your Honor.</p> <p>8 This reflects what payors are doing now. They provide</p> <p>9 primary care physicians in virtually every ZIP code. When</p> <p>10 you look at -- and, indeed, BCI does it for every ZIP code</p> <p>11 in which they have patients; Regence, virtually everybody;</p> <p>12 and PacificSource only slightly less. This suggests how</p> <p>13 important local access is to those that actually spend</p> <p>14 millions of dollars on this, the question of whether or not</p> <p>15 you could provide a reasonable option to people in Nampa</p> <p>16 without -- without having physicians in that locale in</p> <p>17 significant numbers.</p> <p>18 St. Luke's, itself, talks about the Nampa physician</p> <p>19 market. We saw this document before, but this is their</p> <p>20 internal analytics.</p> <p>21 We also have, however, Dr. Argue suggesting, based on</p> <p>22 essentially a flow analysis. This is the -- sort of a</p> <p>23 left-handed Elzinga-Hogarty test, which has been largely</p> <p>24 dismissed in the literature. But, in any case, he basically</p> <p>25 says, look, there's outflow, we should take that into</p>	<p style="text-align: right;">3686</p> <p>1 account. So this is a chart that reflects that view of the</p> <p>2 world.</p> <p>3 There is outflow out of Nampa, but the first point with</p> <p>4 respect to this chart is that the outflow currently has</p> <p>5 nothing to do with price. It looks to Dr. Dranove as if</p> <p>6 these are idiosyncratic, people who got their care where</p> <p>7 they work, people go to -- they have a preexisting</p> <p>8 relationship with a doctor, so they go out of the Nampa</p> <p>9 area. But this shows nothing about what the remaining</p> <p>10 people in Nampa would do if there was a 5 percent increase</p> <p>11 in the price of their care.</p> <p>12 It is interesting that when you look to the far right</p> <p>13 of this chart that the outflows out of Dr. Argue's market</p> <p>14 are actually even larger than the outflows out of</p> <p>15 Dr. Dranove's Nampa market.</p> <p>16 There are a couple of perspectives on that, Your Honor.</p> <p>17 One is the notion that you could have a monopolist in Nampa,</p> <p>18 Nampa-Meridian, all the way through West Boise and that</p> <p>19 monopolist not be able to increase price by 5 percent</p> <p>20 successfully is just an absurd result. It is just not</p> <p>21 possible that that would not be -- could not be sustained.</p> <p>22 The other thing about this chart, interestingly, is</p> <p>23 that -- and one of the criticisms of this kind of analysis</p> <p>24 is there is a daisy-chain problem. If you have outflows at</p> <p>25 every level, you keep going from one market to the next</p>
<p style="text-align: right;">3687</p> <p>1 market to the next market, and, analytically, because of</p> <p>2 outflows, I think I could probably successfully get to</p> <p>3 Jack Bierig's front door using this analysis. So we just</p> <p>4 don't think that this has any significant implication for</p> <p>5 the antitrust question, which is: Would a significant</p> <p>6 number of patients leave Nampa in the event that prices were</p> <p>7 increased by the hypothetical monopolist test of 5 percent?</p> <p>8 Dr. Argue also performed a critical loss analysis or a</p> <p>9 partial critical loss analysis. One could spend hours</p> <p>10 talking about this. Dr. Argue concluded, after he faced</p> <p>11 some criticisms from Dr. Dranove -- his number went from</p> <p>12 6-ish percent to almost 9 percent. Dr. Dranove suggested</p> <p>13 the figure should probably be 21 percent. But the problem</p> <p>14 here -- and I think there is a fundamental failure of proof,</p> <p>15 if you will. To do this analysis, Dr. Argue would have had</p> <p>16 to have actually calculated the actual loss. If there is no</p> <p>17 actual loss calculation, we have no idea what these numbers</p> <p>18 may mean.</p> <p>19 THE COURT: The actual loss becomes problematic</p> <p>20 because that would be an indication of how many patients</p> <p>21 would, in fact, leave?</p> <p>22 MR. GREENE: Yes, I think that's correct,</p> <p>23 Your Honor.</p> <p>24 THE COURT: Requires some speculation.</p> <p>25 MR. GREENE: Yeah. If you were to actually do</p>	<p style="text-align: right;">3688</p> <p>1 that calculation, you would have to make a judgment as to</p> <p>2 how many people would leave. In the literature</p> <p>3 that's -- and not to get geeky here -- but what that</p> <p>4 reflects is what's called the "elasticity of demand," which</p> <p>5 would be how price sensitive are people. And since</p> <p>6 Dr. Argue was unable to do that calculation, we were unable</p> <p>7 to criticize it or ask questions about it in his deposition.</p> <p>8 So I think, fundamentally, this is a failure of proof,</p> <p>9 and I just think, fundamentally, the court can simply ignore</p> <p>10 it because he didn't do the analysis that's required.</p> <p>11 THE COURT: Well, the 8.8 percent was easy because</p> <p>12 that's just a matter of figuring out --</p> <p>13 MR. GREENE: That's pretty arithmetic. At</p> <p>14 itself -- I mean, again, one could spend hours on these</p> <p>15 things. But you may recall, Your Honor, that there was a</p> <p>16 discussion with Dr. Dranove about the impact -- this is very</p> <p>17 sensitive to the degree to which there are variable costs</p> <p>18 involved, so that's where -- that's why you can get from,</p> <p>19 you know, 6 to 8 to 20 to -- actually, 32 would be not a</p> <p>20 totally inappropriate number here.</p> <p>21 But you know the problem, though, is on the question</p> <p>22 mark side, the basic analysis has not been completed, so no</p> <p>23 conclusions can be drawn from the fact that this was</p> <p>24 discussed or presented to the court, from our perspective.</p> <p>25 There is no -- there are other problems with</p>

<p style="text-align: right;">3689</p> <p>1 Dr. Argue's critical loss analysis. I think there are a 2 couple of things that I would highlight here. Economic 3 research and practical experience show that patients rarely 4 choose providers based on price. I mean, not to project our 5 own interests in this, but typically it's location and 6 reputation; it's not because it's 5 percent cheaper or 5 7 percent more expensive. That's really where most 8 people -- how people make their real decisions. 9 Dr. Argue also relied, in part, on a Deloitte study, 10 which indicated that less than 1 percent of patients in that 11 study changed because of price. So we just don't think 12 there is any -- we do think that the price is -- it would 13 have to go up very dramatically in order to incent people to 14 leave Nampa to take that sick child, to take their sick 15 selves to another part of Idaho. 16 Market concentration, HHIs, thresholds. I think we've 17 gone through that in the proposed conclusions of law and 18 findings of fact. But I did want to share, again, 19 Your Honor, some alternatives here. From our perspective, 20 we believe the proper market is Nampa. If it's that market, 21 this is a huge change. The combination of Saltzer and 22 St. Luke's in the primary care services arena creates a 23 behemoth, a juggernaut in that area that has an 80 percent 24 share, just slightly south of that. This exceeds the 25 current guidelines by a wide, wide margin.</p>	<p style="text-align: right;">3690</p> <p>1 The HHI, the most -- the highest you can go in the HHI 2 is 10,000, which is a perfect monopoly. This jumps them to 3 6,200 points, and the delta, or the change, which is also 4 part of the test, is eight times the presumptive illegal 5 threshold. So this is a very, very dramatic and very, very 6 problematic transaction. 7 But the problems don't go away if you actually step 8 back and widen the geographic market somewhat. I think this 9 is very important that Dr. Dranove has given the court some 10 alternatives here to look at, all of which, from our 11 perspective, are problematic. So if you use Nampa and 12 Caldwell, then the HHI jumps to over 4,000, and then the 13 delta, the change, jumps 900 points, and that's four times 14 the presumptive illegal threshold with respect to the delta. 15 Still problematic, still more than sufficient to provide the 16 burden shift that we talked about at the front end of this 17 conversation. 18 Likewise, if you do Nampa, Caldwell, and Meridian, 19 which we think is a very wide-sweeping market and too broad 20 for these purposes, but we did have it calculated, the HHIs 21 are still well above the presumptive thresholds and the 22 guidelines and those guidelines that have been accepted by 23 other courts throughout the United States. In this case, 24 it's over 3,000. It's nearly 1.5 times the concentration 25 that would yield at presumption and seven times the delta.</p>
<p style="text-align: right;">3691</p> <p>1 So this is, I think, completely problematic. And when 2 you look at the case law, this is a situation in which these 3 numbers are well above thresholds, you can easily presume, 4 both practically and legally, that this is a -- this is an 5 extremely problematic merger and should be -- should be 6 enjoined. 7 Anticompetitive effects, we have spoken to this a 8 number of times, but in the interest of time I think I'm 9 going to move forward with those. 10 Can I get to 41? 11 Given Your Honor's particular interest in 12 efficiencies -- obviously, the slide will be available to 13 the court -- but we did want to just go to efficiencies 14 briefly. 15 The standard here, again, arising from the original 16 <i>Philadelphia National Bank</i> considerations as well as this 17 whole notion of how do we deal with the incipency problem, 18 how do we address that from a policy perspective. 19 Defendants need to demonstrate really quite extraordinary 20 efficiencies. That is the calculus that this court will be 21 asked to use as its making decisions. <i>FTC versus ProMedica</i>, 22 this is a relatively new -- this is a two-year-old decision. 23 "No court" -- "No court has found efficiencies sufficient to 24 rescue an otherwise illegal merger." 25 With respect to high market concentration levels</p>	<p style="text-align: right;">3692</p> <p>1 require extraordinary efficiencies, and indeed the 2 more -- the more significant the concentration, the more 3 efficiencies and the more extraordinary those efficiencies 4 must be in order to meet the burden. This requires a 5 rigorous analysis. It requires the rejection of mere 6 speculation and promises. And apropos I think of some of 7 the things you have heard both from percipient witnesses in 8 this case as well as the experts delayed benefits, something 9 five years out or, in Professor Enthoven's case, ten years 10 out, delayed benefits are less proximate and more difficult 11 to predict and thus are entitled to little weight, both 12 under the guidelines and federal law. 13 There are a number of points here that are high level. 14 Let me just very quickly touch on them, Your Honor. 15 St. Luke's and Saltzer executives and their expert agree 16 that it is uncertain whether St. Luke's will provide 17 integrated patient care in the next few years. That is the 18 evidence they have presented to Your Honor. Despite a 19 lengthy track record of acquiring physician practices, 20 St. Luke's failed to demonstrate cost savings or other 21 benefits from its prior acquisitions. Ordinary course 22 documents indicate and confirm that the motivation for this 23 acquisition is not cost or quality but opening up 24 Canyon County, developing the ability to control development 25 in that county; that's what this case is all about. And,</p>

<p style="text-align: right;">3693</p> <p>1 finally, there is no showing that the core theory has any</p> <p>2 basis in the social science or in really much else.</p> <p>3 Is that AEO?</p> <p>4 If you would darken the screen for the next one,</p> <p>5 Your Honor.</p> <p>6 This goes to the point that, according to the VP for</p> <p>7 clinical integration, he's not even sure that this gets done</p> <p>8 by 2020. This goes to the question of delay and the</p> <p>9 necessity for this deal to go forward. I mean, a lot</p> <p>10 happens between now and 2020, and given the background of</p> <p>11 national policy all going in the same direction, this kind</p> <p>12 of statement is just devastating, I think, to their side of</p> <p>13 the case.</p> <p>14 The next one is not AEO, Your Honor.</p> <p>15 Dr. Enthoven, in his testimony, "And in your view, many</p> <p>16 others have tried to take this route have tripped and</p> <p>17 fallen; correct?</p> <p>18 "Correct.</p> <p>19 "And you think it will take ten years or more for</p> <p>20 St. Luke's to achieve the results it seeks; correct?</p> <p>21 "Correct."</p> <p>22 When you map that against the case law, that is just</p> <p>23 devastating.</p> <p>24 Physician employment is not a panacea. I mean, the</p> <p>25 notion that they have repeated and repeated and repeated</p>	<p style="text-align: right;">3694</p> <p>1 here is they need to employ doctors in order to get certain</p> <p>2 results. The social science of this, the economics of this</p> <p>3 does not support the notion that the employment of</p> <p>4 physicians is a superior organizational form. Physicians</p> <p>5 are in various structures all across the United States.</p> <p>6 They are all going in the same direction, they are improving</p> <p>7 quality, they are using EMRs. That is not related to,</p> <p>8 necessarily, whether they are employed or independent.</p> <p>9 Defendants' view is unsupported by the empirical evidence.</p> <p>10 And, finally, the real deciders here appear to be</p> <p>11 organizational functionalities that are not specific and not</p> <p>12 particularly related to employment.</p> <p>13 We do have some ability to look at the prior history of</p> <p>14 St. Luke's. Recall that Dr. Dranove did what's called a</p> <p>15 difference-in-difference analysis, which is to basically</p> <p>16 compare what happened after with respect to prior groups</p> <p>17 acquired by St. Luke's with essentially standardized test</p> <p>18 groups, so it's a compare-and-contrast kind of deal. And I</p> <p>19 think the unrebutted findings -- we find it interesting that</p> <p>20 this was unrebutted by the other side -- but the findings of</p> <p>21 Dr. Dranove are that with respect to St. Luke's past PCP</p> <p>22 acquisitions -- this is the last bullet on the slide -- some</p> <p>23 of them resulted in increased healthcare spending; that is,</p> <p>24 over a comparison to other independent physicians. And that</p> <p>25 defendants -- that when it did not increase it did not</p>
<p style="text-align: right;">3695</p> <p>1 decrease. So the notion that employment results in cheaper</p> <p>2 care is simply not supported by the analysis that we have</p> <p>3 been able to do nor is it supported by the evidence</p> <p>4 presented by St. Luke's.</p> <p>5 The structure of the deal here is inconsistent with</p> <p>6 what most people think should happen in healthcare. The</p> <p>7 deal proposed to Saltzer, I mean, we do know that it's a 40</p> <p>8 percent increase in pay, so it embeds high costs into the</p> <p>9 Idaho healthcare system. It also is based on a wRVU system,</p> <p>10 which means that it's a volume-based structure.</p> <p>11 Just before trial, they did enter into, at least, a</p> <p>12 preparatory or aspirational agreement that says we're going</p> <p>13 to try and work towards quality pay, but it is also the case</p> <p>14 that quality pay is also being given today and has been</p> <p>15 given for a long time in other contexts, including contexts</p> <p>16 in this precise market.</p> <p>17 Core theory, very briefly, we've charted here the</p> <p>18 various statements about the size of the core, so it's gone</p> <p>19 from several hundred to maybe six. So, obviously, my --</p> <p>20 St. Luke's has not gotten its act together in terms of what</p> <p>21 the core should be. But I think the more particular</p> <p>22 statement is the one that's embedded in the bottom of the</p> <p>23 slide, from Dr. Enthoven, which is simply: "What's the</p> <p>24 basis for it, the number of core physicians?</p> <p>25 "All I can say is it's a judgment out of unsupported</p>	<p style="text-align: right;">3696</p> <p>1 opinion."</p> <p>2 Given the case authority and the law, that is simply</p> <p>3 inappropriate.</p> <p>4 Turning to merger specificity. This acquisition is not</p> <p>5 necessary for a variety of reasons, but let's start with</p> <p>6 this. The first is, it is not necessary for St. Luke's or</p> <p>7 Saltzer to provide higher-quality, lower-cost care. It just</p> <p>8 ain't. It's not required for Saltzer to transition away</p> <p>9 from fee-for-service payments to risk-based contracting.</p> <p>10 They can both do it individually. They are both actually</p> <p>11 involved in Medicare Shared Savings Plans. In the case of</p> <p>12 Saltzer, it can participate by way of the networks it</p> <p>13 currently participates in.</p> <p>14 And with respect to IT, IT is being supported by the</p> <p>15 federal government to the tune of over \$30 billion, and</p> <p>16 there are metrics and requirements that are imposed by</p> <p>17 federal regulations.</p> <p>18 This is not necessary for Saltzer and St. Luke's to</p> <p>19 work together. Both sides have indicated in sworn testimony</p> <p>20 that if this deal is unwound, they will continue to try and</p> <p>21 work together to improve costs and improve quality.</p> <p>22 St. Luke's could reward independent physicians for</p> <p>23 quality. I mean, the notion that somehow you have to employ</p> <p>24 physicians is literally a little nutty, actually. I mean,</p> <p>25 it is actually so odd based on what's happening in the rest</p>

<p style="text-align: right;">3697</p> <p>1 of the United States that it's surprising, Your Honor.</p> <p>2 Firstly, commercial healthcare plans, as Dr. Kizer</p> <p>3 explained to you, are doing this across the United States.</p> <p>4 They are building pay-for-performance systems, pay for</p> <p>5 performance is built into Medicare. Other health systems,</p> <p>6 including Advocate that I mentioned here. Advocate is one</p> <p>7 of the best systems in all of the United States, and they,</p> <p>8 as a matter of ordinary course, have pay-for-performance</p> <p>9 contracts with independent physicians. Saint Alphonsus, one</p> <p>10 of their major competitors in the Idaho market, has been</p> <p>11 paying its independent physicians since 2004 quality bonuses</p> <p>12 based on meeting or exceeding certain quality metrics. This</p> <p>13 is not new news. This is not innovative. This is not</p> <p>14 something that's unique to St. Luke's. It is the standard,</p> <p>15 increasingly, in the U.S. market and certainly in the Idaho</p> <p>16 market.</p> <p>17 Defendants can engage in risk-based contracting without</p> <p>18 the deal. That is clearly the case. They can engage with</p> <p>19 the Medicare Shared Savings Plan. St. Luke's can --</p> <p>20 or Saltzer can certainly participate in any risk-based</p> <p>21 structures created by the other networks in which it's</p> <p>22 involved, including the Select network, which is being</p> <p>23 created by St. Luke's. St. Luke's, itself, could engage in</p> <p>24 risk-based contracting without -- without Saltzer. I think</p> <p>25 the -- both Patricia Richards spoke to this quite</p>	<p style="text-align: right;">3698</p> <p>1 articulately, and then Dr. Argue admitted St. Luke's could</p> <p>2 pursue risk-based contracting without Saltzer, boom, full</p> <p>3 stop. So that takes away this notion that this employment</p> <p>4 relationship is required.</p> <p>5 THE COURT: Counsel, I suspect there are different</p> <p>6 types of risk-based contracting. And to have a true, I</p> <p>7 guess, capitation-based contracting, you've got to spread</p> <p>8 the risks sufficiently broadly that you can write out, you</p> <p>9 know, I guess the outliers who are going to have</p> <p>10 inordinately high medical care expenses.</p> <p>11 So there is at least some value in larger clinically</p> <p>12 and financially integrated healthcare systems to achieve</p> <p>13 risk-based contracting; isn't that true?</p> <p>14 MR. GREENE: I think that there probably is a</p> <p>15 minimum number. I mean, the -- Mr. Crouch spoke to a</p> <p>16 risk-based contract with two physicians that he thought was</p> <p>17 quite good.</p> <p>18 THE COURT: But how could a risk -- how could a</p> <p>19 two-physician practice engage in a fully risk-based</p> <p>20 contract?</p> <p>21 MR. GREENE: Well, what they do is basically</p> <p>22 gainsharing. So I think there are a couple of perspectives</p> <p>23 on this first thing, Your Honor. As Dr. Kizer in his</p> <p>24 testimony explained, there is no social science or</p> <p>25 econometrics that suggest that a gainsharing contract is any</p>
<p style="text-align: right;">3699</p> <p>1 less effective than a full-risk contract, so the fact that</p> <p>2 people are engaged currently in, say, a Medicare Shared</p> <p>3 Savings Plan, which is a gainsharing plan, it is not the</p> <p>4 case that that means that less money is being saved or that</p> <p>5 does not create incentives to improve care and reduce costs.</p> <p>6 I'm originally from California. Your Honor mentioned</p> <p>7 Kaiser. Kaiser has a 40 percent share. Separate and apart</p> <p>8 from Kaiser, 45 percent -- in addition to Kaiser's 40</p> <p>9 percent -- of people in California are served under</p> <p>10 risk-based, fully capitated contract. I mean, the</p> <p>11 per-member/per-month contract is a very standard contract in</p> <p>12 the state of California. That's one of the things that I</p> <p>13 think Dr. Kizer was trying to speak to: that this is very</p> <p>14 common, very ordinary. It doesn't take 500 doctors to do</p> <p>15 it.</p> <p>16 THE COURT: Was that almost mandated by some state</p> <p>17 policy? Either encouraged or --</p> <p>18 MR. GREENE: It is encouraged. The ability to</p> <p>19 take on risk -- very briefly, the California law is called</p> <p>20 the Knox-Keene statute, so there are Knox-Keene IPAs, which</p> <p>21 are given the opportunity to engage in contracts on a</p> <p>22 per-member/per-month basis. The downside from a policy</p> <p>23 perspective from this kind of a contract is it may incent</p> <p>24 physicians to provide -- or whatever the contractee might</p> <p>25 be -- provide less care than is appropriate.</p>	<p style="text-align: right;">3700</p> <p>1 So the concern of policymakers in the California</p> <p>2 Legislature is that you didn't want to create a situation in</p> <p>3 which patients would be getting cheaper care because it</p> <p>4 would create more profit for the doctors. So there is a</p> <p>5 structure that is designed into the Knox-Keene statute to</p> <p>6 make sure that doesn't happen. But that statute very much</p> <p>7 facilitates the taking on of risk. And capitated contracts,</p> <p>8 actually, have been very much the standard since the 1980s</p> <p>9 and '90s in California.</p> <p>10 THE COURT: So does that suggest that this problem</p> <p>11 that everyone here is facing ultimately cries out for some</p> <p>12 type of a -- kind of a social policy, state legislature</p> <p>13 response to put everyone on the same course rather than</p> <p>14 doing it piecemeal as appears to be happening now?</p> <p>15 MR. GREENE: I think that probably would make a</p> <p>16 lot of sense. I mean, I don't want to arrogate to myself</p> <p>17 being somebody that suggests things to the Idaho</p> <p>18 Legislature, but, certainly, there could be statutory</p> <p>19 changes that would incent managed care and the taking of</p> <p>20 risk in terms of capitated contracts.</p> <p>21 It is also the case that -- that the Medicare program</p> <p>22 under CMS guidelines is expecting, in the next two years --</p> <p>23 we have Medicare savings plans now. We will be moving to</p> <p>24 full-risk plans very soon. So there is a national</p> <p>25 effort -- again, the context is important here, Your Honor.</p>

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1 The whole system is arcing towards the kinds of things that
2 St. Luke's has been talking about. That's why it is not the
3 case that this deal is necessary for these kinds of benefits
4 to be -- to be obtained.

5 And on that point, Your Honor, let me turn to my
6 colleagues because we do want to reserve a bit more time for
7 rebuttal. Thank you, Your Honor.

8 THE COURT: Thank you.

9 Mr. Ettinger. Counsel, we'll probably take a break in
10 about half an hour.

11 MR. ETTINGER: Okay. My target, Your Honor, is to
12 be done in a half an hour and save the rest for rebuttal,
13 so --

14 THE COURT: Then that would be great timing.

15 MR. ETTINGER: -- I believe that will work.

16 Your Honor, I've got a number of things to say, but I'm
17 going to focus, as well, on your questions. It probably
18 makes a lot of sense. Since they apply, certainly, to all
19 the cases, the private plaintiffs' case, as well as the
20 common case. And so let me work with my slides but kind of
21 move around them a little bit.

22 Your Honor, the first point, though, I want to address
23 is credibility. A lot of the testimony on all of the
24 issues -- including the quality issue, Your Honor, I'm going
25 to get to it -- depend upon the credibility of the

1 witnesses. And, frankly, what you've seen a lot of in this
2 case is ordinary-course documents of the defendants that
3 plaintiffs have presented versus self-serving testimony from
4 the defendants in court. Now, there's nothing wrong with
5 being self-serving; everybody's testimony is self-serving.
6 The question is is it credible.

7 And here we have dramatic examples of where the
8 defendants' testimony is completely at odds with their own
9 documents, with their own depositions, the direct and
10 cross-examination. And I think as Your Honor thinks about
11 these quality issues, as well as others, it's important to
12 keep that in mind. So I'm going to go through these
13 quickly.

14 But, you know, for example, we have witnesses who say
15 dominant doesn't mean to dominate. Control means input.
16 It's almost as much as black means white. Witnesses saying
17 something would be disastrous for Saltzer unwinding, and
18 then calling that overly dramatic, in a doomsday scenario,
19 in their depositions. So there are a series of these,
20 Your Honor, that we have in our slides. Some of them on
21 quality. Claims that just started measuring quality with
22 St. Luke's; whereas, in fact, Dr. Souza and his group had
23 quality metrics years before with Saint Al's when they were
24 owned by nobody.

25 The most important one, though, Your Honor, and I think

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1 this goes to -- this goes to what your questions raise, is
2 John Kee. And it's a little bit more subtle, but it's more
3 dramatic, and it really points to a lot of the key flaws in
4 the quality story.

5 Mr. Kee said on direct: You know, if I were running
6 Saltzer and Saltzer were unwound, there would be no point in
7 doing any of this. We just could forget about these quality
8 innovations and practice the old way. Mr. Kee explained
9 that his job as of August 2013, his sole reason for being at
10 St. Luke's, is to do these things with independents. His
11 goals are to develop a network that integrates clinically
12 between St. Luke's clinics and the independent medical
13 community, and goes on and explains it in the last line,
14 apropos of Your Honor's questions, "to establish value-based
15 insurance contracting relations with the payor community."

16 So Mr. Kee, one of the most senior executives at
17 St. Luke's, has as his sole job to do exactly what
18 St. Luke's says doesn't work. Your Honor, this makes no
19 sense. Why did Mr. Kee take this job if he thinks it's
20 impossible? It just shows the lack of credibility in their
21 whole story, Your Honor.

22 And I want to go on to get to some more specifics in
23 that.

24 Why is Mr. Kee's statement on direct, why is St. Luke's
25 wrong? Well, because risk-based contracting is going on in

1 lots of different ways around the country. One example
2 Mr. Greene mentioned is Advocate. What's interesting here
3 is Randy Billings, one of the senior vice presidents at
4 St. Luke's, said these things because he was at Advocate
5 previously. Advocate is three-quarters independent
6 physicians, and they are doing these risk-based contracts,
7 and they are widely regarded as one of the hallmarks of it,
8 and Mr. Billings, in his resume, touted it. This is a
9 St. Luke's official.

10 Saint Al's is working at doing the same things. It's
11 in process, but, of course, so is St. Luke's. And Saltzer
12 is free to join a Saint Al's network or to join a Select
13 network with BrightPath. SelectHealth, of course, that
14 St. Luke's touts, is going to have contracts with
15 BrightPath, and BrightPath is mostly independent doctors.
16 So everything everybody is doing, including St. Luke's, is
17 depending upon independent doctors in the networks to do
18 risk-based contracting. And when St. Luke's says you can't
19 do it that way, it's inconsistent with their own statements
20 and their own behavior.

21 Your Honor, finally, Professor Enthoven on this point
22 was -- I asked him about clinically integrated networks of
23 independent providers, and after he touted how you've got to
24 have everybody effectively owned, he said, well, that's in
25 his gray zone. You know, 15 years ago, IPAs, independent

<p>3705</p> <p>1 provider associations, tended to be pretty loose. That's</p> <p>2 much less true today. You have people like Advocate. As</p> <p>3 Mr. Greene said, everybody is moving to this. And</p> <p>4 Dr. Enthoven admitted: That's my gray zone. I haven't kept</p> <p>5 up with that.</p> <p>6 And so the answer is that you -- it's not just a</p> <p>7 Kaiser. It's not the only way to go. But you know Kaiser</p> <p>8 is very interesting, Your Honor, because I asked Professor</p> <p>9 Enthoven about Kaiser, and he admitted -- and this is at</p> <p>10 pages 2656, line 25, to 2657, line 22, of his</p> <p>11 cross-examination -- he admitted, and in his deposition,</p> <p>12 that Kaiser, the physician group, is not owned by Kaiser,</p> <p>13 the hospital, and it doesn't even contract with Kaiser, the</p> <p>14 hospital. So there is a large group there, but it's not the</p> <p>15 Luke's model, and so it doesn't support the Luke's model.</p> <p>16 And he said every other example he talked about with no</p> <p>17 specifics, no data, whether it's Geisinger or Mayo or</p> <p>18 whoever is half fee-for-service. And so they're in a gray</p> <p>19 zone, as well.</p> <p>20 Your Honor, your question to Mr. Greene a minute ago</p> <p>21 about full risk. Full risk meaning share in the insurance</p> <p>22 premium, meaning capitation, can be done by any kind of</p> <p>23 network, and the network then has to work out the specific</p> <p>24 arrangements of how it shares with the physicians,</p> <p>25 independent or employed, which can be through a variety of</p>	<p>3706</p> <p>1 mechanisms, a risk hold, there could be -- a risk withhold,</p> <p>2 there could be formulas.</p> <p>3 Your Honor, I represented HMO, IPA models that worked</p> <p>4 with HMOs. They took capitation, and then they worked it</p> <p>5 out with the independent doctors in about 1988. This is not</p> <p>6 a new idea. It's been around for a long time. And you can</p> <p>7 do it. And, indeed -- and Mr. Petersen's testimony speaks</p> <p>8 to this -- in some ways, it's easier to do it with</p> <p>9 independents because the independent doctor you can</p> <p>10 contractually put him at risk directly. The St. Luke's</p> <p>11 doctors are not at risk directly. They are, right now,</p> <p>12 under, as we know, wRVU contracts that are slowly, slowly</p> <p>13 moving to some kind of quality-based mechanism. But those</p> <p>14 doctors are not sharing the premium. They are not taking</p> <p>15 the risk; there is an intermediary. And so there are</p> <p>16 financial challenges any way you cut it. And, indeed,</p> <p>17 arguably, it's harder when you employ the doctors.</p> <p>18 Which brings me, Your Honor, to what I'm calling five</p> <p>19 fatal flaws in St. Luke's quality defense. And I think they</p> <p>20 are fatal because any one of them destroys this defense,</p> <p>21 legally or factually. Let me go through them quickly.</p> <p>22 First, Your Honor, the defense is legally misplaced.</p> <p>23 And this starts with the <i>Rockford</i> case, the original</p> <p>24 <i>Rockford</i> case in 1988, where a hospital merger was declined.</p> <p>25 They raised a quality defense. And the court said that</p>
<p>3707</p> <p>1 quality improvement would have a positive impact, but the</p> <p>2 court said it's not relevant. And I think it's not relevant</p> <p>3 here for the same reason. The court said its exclusive role</p> <p>4 is to evaluate the merger's effect on competition and no</p> <p>5 more.</p> <p>6 Does that -- Your Honor, am I saying that that means</p> <p>7 that quality is irrelevant, necessarily? I am not saying</p> <p>8 that. I am saying unless you relate it to effects on</p> <p>9 competition, unless you can show that because of the</p> <p>10 efficiencies, the anticompetitive effects are not going to</p> <p>11 occur, then it's irrelevant. And here there has been no</p> <p>12 such showing. No effort, no serious effort, at any such</p> <p>13 showing.</p> <p>14 THE COURT: Does 24 years make that statement not</p> <p>15 as perhaps -- I mean, I think there has been a realization</p> <p>16 in at least the last 10 or 15 years that there is a</p> <p>17 healthcare crisis that has to be addressed. Does that make</p> <p>18 it any less or more relevant today?</p> <p>19 MR. ETTINGER: Your Honor, I would say two things.</p> <p>20 First of all, Congress has not amended the antitrust laws,</p> <p>21 and this is based on the core antitrust principle going</p> <p>22 ahead to some other old cases, but the United States Supreme</p> <p>23 Court in <i>Philadelphia National Bank</i> said, we are not allowed</p> <p>24 to make a value choice between competition and some other</p> <p>25 value. It's apples and oranges. And, Your Honor, I would</p>	<p>3708</p> <p>1 question how do you even make that choice? What guidance do</p> <p>2 you have under the law to make that choice? How do you</p> <p>3 weigh the two? I mean, the question is unanswerable, and</p> <p>4 that's why it's not permitted.</p> <p>5 In the <i>National Society of Professional Engineers</i> case,</p> <p>6 Your Honor, the argument there was it was a bid-rigging</p> <p>7 organization to try to limit low prices for architectural</p> <p>8 bids. And the defense was, if people bid too low to put up</p> <p>9 these buildings, our buildings are going to fall down.</p> <p>10 We've got to have a floor. And the Supreme Court didn't say</p> <p>11 "You're wrong." The Supreme Court said, "It doesn't</p> <p>12 matter."</p> <p>13 THE COURT: Well, the burden-shifting -- I'll call</p> <p>14 it "the burden-shifting analysis" -- that once the prima</p> <p>15 facie case has been established, then there has to be some</p> <p>16 justification provided of the procompetitive effects of the</p> <p>17 merger. And your argument, then, is that quality arguments</p> <p>18 are not procompetitive arguments; they're just apples and</p> <p>19 oranges. Is that --</p> <p>20 MR. ETTINGER: My argument is a little narrower,</p> <p>21 Your Honor. My argument is Luke's quality arguments are not</p> <p>22 procompetitive arguments. And that's a very important</p> <p>23 point. Is it possible that one could argue, in theory,</p> <p>24 that, for example, certain quality gains are going to occur</p> <p>25 and, therefore, the quality-adjusted prices are going to be</p>

<p style="text-align: right;">3709</p> <p>1 no higher despite the dominant market position than they</p> <p>2 otherwise would be?</p> <p>3 I hesitate to start making up arguments for the</p> <p>4 defendants, but if one went down that road, one -- and could</p> <p>5 prove it -- one might be heading, at least, in the right</p> <p>6 direction to say that there are no anticompetitive effects</p> <p>7 left once you consider the quality defense.</p> <p>8 But Luke's hasn't tried to show that.</p> <p>9 THE COURT: Okay.</p> <p>10 MR. ETTINGER: That's the problem, Your Honor.</p> <p>11 THE COURT: In other words, even if you talk</p> <p>12 quality, it has to be phrased in language which is truly</p> <p>13 procompetitive in terms of pricing and the market?</p> <p>14 MR. ETTINGER: Yeah. And more than language. I</p> <p>15 think that they have to -- you have to show that the</p> <p>16 anticompetitive effects aren't going to occur.</p> <p>17 THE COURT: Okay.</p> <p>18 MR. ETTINGER: In essence, what Luke's is saying</p> <p>19 here, Your Honor, is: So what if we have a monopoly. It</p> <p>20 will be a benign monopoly doing good things. And the</p> <p>21 antitrust laws flat-out don't permit that argument.</p> <p>22 THE COURT: It would have to be rephrased in that</p> <p>23 if we have a monopoly, it will result in quality, which in</p> <p>24 some way will actually yield such procompetitive effects</p> <p>25 that would outweigh whatever anticompetitive consequences</p>	<p style="text-align: right;">3710</p> <p>1 may flow from the merger, or something like that.</p> <p>2 MR. ETTINGER: Well, you would have to show that</p> <p>3 there are no net anticompetitive effects. And here, of</p> <p>4 course, we've got a series of different anticompetitive</p> <p>5 effects, Your Honor -- you know, pricing, foreclosure, harm</p> <p>6 to network competition, growth in dominant shares. You have</p> <p>7 to show somehow that the quality benefits would address</p> <p>8 these issues and you wouldn't net have these kinds of</p> <p>9 problems.</p> <p>10 And, you know, again, I don't want to try to create a</p> <p>11 roadmap; it's not my job. But you'd have to address these</p> <p>12 issues, and St. Luke's simply hasn't done so. They said two</p> <p>13 things that they might argue pass on this issue; I don't</p> <p>14 think it goes farther. Professor Enthoven said, "Well,</p> <p>15 sometimes, you know, maybe we'll get other people doing more</p> <p>16 of the same thing in response to St. Luke's." Well, that</p> <p>17 doesn't say that you're not going to have anticompetitive</p> <p>18 effects from this deal, and it's a big maybe.</p> <p>19 Secondly, St. Luke's has pointed to SelectHealth as a</p> <p>20 procompetitive benefit. But the whole point is,</p> <p>21 SelectHealth is going to deal with BrightPath. Saltzer was</p> <p>22 in BrightPath before the acquisition and, therefore, with or</p> <p>23 without this acquisition, SelectHealth is in this market.</p> <p>24 That doesn't depend on the Saltzer acquisition at all. So</p> <p>25 that's not a procompetitive effect. You just don't have one</p>
<p style="text-align: right;">3711</p> <p>1 that's been articulated and certainly not proven here.</p> <p>2 So that's the first legal flaw here, Your Honor.</p> <p>3 They've got to relate it to the procompetitive effects and</p> <p>4 prove it, and they haven't.</p> <p>5 The second fatal flaw, Your Honor, is, in great detail,</p> <p>6 I think the evidence shows that, you know, independents --</p> <p>7 it can be done with independents, and all the kinds of</p> <p>8 benefits that St. Luke's has pointed to are being done with</p> <p>9 independents. And we presented substantial evidence to this</p> <p>10 effect. In some cases, St. Luke's own activities with</p> <p>11 independents, like their MSOs, which, by the way, the</p> <p>12 evidence says -- St. Luke's evidence, St. Luke's</p> <p>13 witnesses -- virtually all the orthopedic benefits have come</p> <p>14 through the MSOs.</p> <p>15 Data analytics. Your Honor, I just want to make one</p> <p>16 quick point there, and that is, you know, Explorys does this</p> <p>17 on multiple platforms, which means you can have different</p> <p>18 independents on different EMRs. It's already in 295</p> <p>19 hospitals, so it's an established system. So, clearly,</p> <p>20 that's an alternative that can work with independents.</p> <p>21 Your Honor, St. Luke's has tried to argue it's more of</p> <p>22 the same. St. Luke's has also tried to argue that</p> <p>23 independents don't have an incentive to improve quality,</p> <p>24 and, Your Honor, that's speculation that is contrary to all</p> <p>25 the evidence in the record.</p>	<p style="text-align: right;">3712</p> <p>1 First of all, doctors are like anybody else. If they</p> <p>2 have higher quality and they treat their patients better --</p> <p>3 Dr. Fortuin's example of the woman he saved is going to get</p> <p>4 around, and you're going to have more patients. The market,</p> <p>5 in general, works, and healthcare is no different.</p> <p>6 Even the Saltzer witnesses admitted they advertise</p> <p>7 their EMR on their website. They think it helps them. The</p> <p>8 government is going to be providing quality incentive</p> <p>9 payments. There is a whole series of reasons why these</p> <p>10 incentives exist for independents. And if they didn't, and</p> <p>11 independents are never going to do any of this, then why was</p> <p>12 Mr. Kee appointed, taken from his important job running the</p> <p>13 St. Luke's clinic to solely work with the independents?</p> <p>14 Your Honor, the next problem, the next fatal flaw is</p> <p>15 that St. Luke's has been telling you for two weeks, at</p> <p>16 least, maybe more in this case, that it won't work with</p> <p>17 independents, and they admit they've never tried it</p> <p>18 sufficiently. Dr. Pate admitted until 2013, give or take a</p> <p>19 few weeks, St. Luke's did not devote sufficient resources to</p> <p>20 its efforts with independents. And, of course, Mr. Kee</p> <p>21 wasn't appointed until August. So how can they meet their</p> <p>22 burden to show that this is merger specific, that you can't</p> <p>23 do it with independents when they did not try?</p> <p>24 Your Honor, the core issue, one point on this,</p> <p>25 Mr. Greene talked about it, and the point is this: Unless</p>

<p style="text-align: right;">3713</p> <p>1 St. Luke's can say we need X doctors who are employed to 2 make things work or we need a specific scale involving Y 3 doctors, then how can they say we need to have a market 4 share of 80 percent? And unless they can connect those 5 dots, unless they can say that in order to achieve the 6 efficiencies they need a particular share, they can't 7 justify what they're doing.</p> <p>8 So, Your Honor, I think -- and then, finally, 9 Your Honor, this is really a speculative defense. 10 Dr. Enthoven -- Professor Enthoven said ten years or more, 11 perilous, as Mr. Greene said. Dr. Pate called this an 12 experiment. There are no quantified benefits from what 13 St. Luke's has done based on all of the prior acquisitions. 14 So given this, how can you say they've met their burden when 15 by their own expert's testimony, their own CEO's testimony, 16 this is just a big question mark?</p> <p>17 And, Your Honor, I would characterize this -- without 18 making too much light of it, but occasional humor helps -- 19 this is the Wimpy defense, Your Honor. Your Honor, you and 20 I and Mr. Bierig are old enough to remember the Popeye 21 cartoons, and Wimpy was famous for saying, "I will gladly 22 pay you Tuesday for a hamburger today." And, Your Honor, 23 that is St. Luke's case in a nutshell. They are saying in 24 the future, might be ten years, according to Professor 25 Enthoven, it might be 2020, according to Dr. Swanson, we're</p>	<p style="text-align: right;">3714</p> <p>1 going to achieve these great benefits, so let us merge 2 today, and the anticompetitive effects are going to start 3 today. And that simply doesn't work under the antitrust 4 laws, under the case law, and it simply doesn't work under 5 common sense, either, Your Honor.</p> <p>6 So, Your Honor, let me go on and spend a few minutes on 7 the market issues, if I may. First of all, on market 8 definition, just one quick point, and that is, here, as 9 well, it's kind of a Wimpy defense -- again, capital W not 10 small W, Your Honor -- Dr. Argue's whole market definition 11 argument is that -- is that people will switch for financial 12 incentives. But Dr. Argue admitted today there are very few 13 people in the Treasure Valley, Micron and not much else, who 14 are actually experiencing these financial incentives, and he 15 doesn't know when they will get widespread. He doesn't know 16 if they will get widespread. He doesn't know if it will be 17 five more years, ten more years or whatever. So, today, you 18 don't have those incentives in place to cause people to 19 switch.</p> <p>20 And Your Honor recalls Dr. Argue said, "Well, if the 21 critical loss is 8.8 percent, to exceed that, if only 10 22 percent actually face financial incentives, then 88 percent 23 of that 10 percent would have to switch." And I would 24 suggest, though, St. Luke's has not given us a number; with 25 one major employer with financial incentives, that number is</p>
<p style="text-align: right;">3715</p> <p>1 in the 10 percent or lower range today. So you were talking 2 about a market situation where you're never going to get 3 that kind of switching. So, again, it's: Let us merge 4 today and maybe there will be incentives to offset market 5 power sometime in the future; we don't know when. So it's 6 another "pay you Tuesday" defense, Your Honor, that just 7 doesn't work.</p> <p>8 Your Honor, very briefly, and I'm going to just flip 9 through these charts quickly because they're AEO. We could 10 blank the screen. Why don't we do that. Could we blank the 11 screen, Your Honor?</p> <p>12 THE COURT: Yes.</p> <p>13 MR. ETTINGER: What those two charts show, 14 Your Honor, is St. Luke's argues pretty aggressively that 15 market share isn't the answer here. Well, their problem is 16 that there are document after document where St. Luke's and 17 Saltzer witnesses say that market share does matter, that 18 they base their analysis on market share, and so I think 19 they really can't make that stick. That's all I really want 20 to say on that, Your Honor.</p> <p>21 We can unblank the screen now.</p> <p>22 Your Honor, this is a critical point on the market 23 issue, and that is this network competition defense.</p> <p>24 MR. STEIN: David, I don't believe we can blank 25 the screen for this.</p>	<p style="text-align: right;">3716</p> <p>1 MR. ETTINGER: You think that should be blanked?</p> <p>2 MR. STEIN: Yes.</p> <p>3 MR. ETTINGER: Okay, okay.</p> <p>4 THE COURT: Let me just ask -- this is more of an 5 observation, but when -- I think I mentioned, at maybe even 6 at a pretrial conference, that I've become kind of a fan of 7 the writing of Clayton Christensen, and I referred to his 8 book, <i>The Innovator's Prescription</i>. But his first book 9 talked about disruptive technology and how that is changing 10 the business world. And one of the things that strikes me 11 is that whenever you're in a state of transition, you are 12 going to have people who are still thinking about the way 13 the old world was structured, the old business world, and 14 their market was structured, and people who are thinking 15 about the way it is going to be structured going forward. 16 And when I see comments like people -- the last slide that 17 you showed where an individual referred to kind of the need 18 to have market power in our negotiations, that sounds like 19 an old -- the old-school thinking, and perhaps others in the 20 same organization are thinking about how do we need to 21 position ourselves going forward.</p> <p>22 And I'm not suggesting that you just ignore those 23 inconsistencies but that within an organization, you're 24 always going to have people thinking about, in the same way 25 that the -- you know, in the Pentagon, half the generals are</p>

<p style="text-align: right;">3717</p> <p>1 fighting the last war and half of them are thinking about,</p> <p>2 hopefully, the next war, and the war we're currently in.</p> <p>3 Just an observation. And I'm not saying that that's -- go</p> <p>4 ahead. I assume you want to respond to that.</p> <p>5 MR. ETTINGER: I'm glad you made it because it's a</p> <p>6 point I meant to make, and it's a very important one, and I</p> <p>7 could not disagree more, respectfully. And let me tell you</p> <p>8 why.</p> <p>9 THE COURT: Okay.</p> <p>10 MR. ETTINGER: All of the witnesses, including</p> <p>11 Dr. Argue, agree in a world of risk, market power is still</p> <p>12 an equally big problem.</p> <p>13 THE COURT: Okay.</p> <p>14 MR. ETTINGER: If you're a monopoly and there is a</p> <p>15 risk-based contract to be negotiated, you're going to get a</p> <p>16 better price. It's still a price; it's just a different</p> <p>17 kind of price. Whether it's a fee-for-service price or it's</p> <p>18 a percent of the premium, it is still a price. The merger</p> <p>19 guidelines don't depend on one kind of price. You read</p> <p>20 them; they talk about bargaining markets and auction</p> <p>21 markets. You know, there's a zillion kinds of prices in the</p> <p>22 economy, and the merger guidelines and the antitrust laws</p> <p>23 weren't written for fee-for-service healthcare, Your Honor.</p> <p>24 And the principles are exactly the same.</p> <p>25 So if we end up in a new world of risk-based</p>	<p style="text-align: right;">3718</p> <p>1 contracting, it's still going to be the case that if</p> <p>2 somebody has too much power and there are too few</p> <p>3 alternatives, then prices are going to go up. I don't think</p> <p>4 that changes even a little bit.</p> <p>5 THE COURT: That's a good response. Thank you.</p> <p>6 MR. ETTINGER: Thank you, Your Honor.</p> <p>7 So let me go on to the next slide. I guess -- well, I</p> <p>8 don't want to take time discussing what should be AEO or</p> <p>9 not, so we'll keep it blank, Your Honor.</p> <p>10 The network competition point is, of course, one of the</p> <p>11 critical elements of the private plaintiffs' case. And I</p> <p>12 think what's really compelling here is it's basically been</p> <p>13 given up by St. Luke's, with a couple small exceptions,</p> <p>14 Your Honor.</p> <p>15 None of their managed care witnesses have come in to</p> <p>16 try to defend their strategy. They have not disputed, at</p> <p>17 all, the documents we have shown that said they have a</p> <p>18 strategy to cripple everybody else's networks. They have</p> <p>19 not disputed the importance of network competition. And,</p> <p>20 Your Honor, you put those together, this alone establishes</p> <p>21 the kind of harm to competition that we need to establish</p> <p>22 to -- in the hospital and facility -- surgical facilities</p> <p>23 markets to prove our case because everybody is using these</p> <p>24 networks.</p> <p>25 And to go on to the next slide, Your Honor, which I</p>
<p style="text-align: right;">3719</p> <p>1 don't believe is AEO, IPN is one of these networks. It</p> <p>2 represents the second largest number of lives. It</p> <p>3 represents the national payors. St. Luke's uses BrightPath</p> <p>4 for SelectHealth and considers Select Medical critical.</p> <p>5 Network competition is critical, and it is vitally</p> <p>6 threatened by the behavior here, and it will be -- that</p> <p>7 threat will be substantially enhanced with the Saltzer</p> <p>8 transaction, Your Honor.</p> <p>9 And, Your Honor, there is substantial evidence of that</p> <p>10 in the record, and I'm going to just go through these</p> <p>11 quickly because I'm running out of time, but we've got lots</p> <p>12 of evidence to show that that's true from lots of witnesses.</p> <p>13 The next slide, I think -- let me go through those very</p> <p>14 quickly so we didn't need to blank them.</p> <p>15 We've got lots of evidence that St. Luke's plan is to</p> <p>16 create this harm. And, Your Honor, what St. Luke's is left</p> <p>17 with, basically, is the following somewhat oxymoronic</p> <p>18 position. This is St. Luke's proposed finding 451, and I</p> <p>19 call it, <i>Through the Looking-Glass</i>. At least I am moving</p> <p>20 up, Your Honor, from cartoons to novels now. But what</p> <p>21 St. Luke's says here is even if the Saltzer physicians are</p> <p>22 withdrawn from competing networks, that is not</p> <p>23 anticompetitive. And what they say is people compete by</p> <p>24 trying to make their network look more attractive.</p> <p>25 Well, Your Honor, making your network look more</p>	<p style="text-align: right;">3720</p> <p>1 attractive is one thing. Trying to torpedo the other guy's</p> <p>2 network is a horse of an entirely different color, and</p> <p>3 that's what St. Luke's is, undisputedly, planning to do.</p> <p>4 And that's anticompetitive. And there is no case that says</p> <p>5 this is right. There is no testimony. Professor</p> <p>6 Haas-Wilson was asked, "Do networks compete by trying to</p> <p>7 look more attractive?"</p> <p>8 She said, "Sure."</p> <p>9 Nobody asked her, "Do they compete by trying to pull</p> <p>10 the key providers from their competitors?" Because that</p> <p>11 cannot work.</p> <p>12 Your Honor, just a couple quick additional points, and</p> <p>13 then I better sit down and save for rebuttal, and that</p> <p>14 relates to harm to competition.</p> <p>15 And I think I want to go to my slide -- why don't we go</p> <p>16 to 44. Is this 44? Okay.</p> <p>17 So, Your Honor -- actually, let's back up. Let's go to</p> <p>18 36 real quickly.</p> <p>19 Your Honor, so there are many -- a couple of legal</p> <p>20 points I want to make real quickly. There are many</p> <p>21 different prongs to our claim of harm to competition in the</p> <p>22 hospital and surgical facilities markets. And, you know,</p> <p>23 you've seen these before. I won't address them now. The</p> <p>24 key point is St. Luke's has tried to set up some kind of</p> <p>25 bright-line test in terms of foreclosure, but when</p>

<p style="text-align: right;">3721</p> <p>1 foreclosure is only one of many elements, the Supreme Court</p> <p>2 has made clear, in <i>Continental Orr</i>, you don't</p> <p>3 compartmentalize the proofs, you look at the cumulative</p> <p>4 effect.</p> <p>5 And Dr. Argue said it right here. He said the test is</p> <p>6 whether St. Luke's actions diminished substantially the</p> <p>7 competitive constraint that competitors have on St. Luke's.</p> <p>8 And that's the test that ought to be looked at, Your Honor,</p> <p>9 in terms of assessing harm in these markets.</p> <p>10 And because St. Luke's is dominant, because there are</p> <p>11 only a couple rivals, you hurt those rivals, and you're</p> <p>12 harming competition. I won't go through the evidence of the</p> <p>13 harm now, Your Honor.</p> <p>14 I do want to point out that the law is also quite clear</p> <p>15 that you've got to look at this in the context of past</p> <p>16 acquisitions, and you've got to look at it in the context of</p> <p>17 future transactions, which is critically important because</p> <p>18 we know the evidence shows that St. Luke's has a whole bunch</p> <p>19 of transactions on hold right now, pending this litigation.</p> <p>20 Indeed, their activity with regard to network competition is</p> <p>21 on hold right now pending the FTC investigations in this</p> <p>22 litigation. That's St. Luke's testimony.</p> <p>23 So Your Honor's actions affect more than Saltzer. They</p> <p>24 affect other acquisitions and their effect on the</p> <p>25 marketplace. And so that's an important thing that I think</p>	<p style="text-align: right;">3722</p> <p>1 you need to keep in mind as you look at this evidence,</p> <p>2 Your Honor.</p> <p>3 Your Honor, the last point I guess I would like to</p> <p>4 make -- and we need to blank the screen -- is go to slide</p> <p>5 56 -- 57.</p> <p>6 Keely, this is the Dr. Swanson; have we got the right</p> <p>7 one? Yeah.</p> <p>8 Your Honor, I just want to remind the court --</p> <p>9 MS. DUKE: It's slide 58, just for the record.</p> <p>10 MR. ETTINGER: 58. Sorry, Your Honor. We changed</p> <p>11 the slide numbers at the last minute.</p> <p>12 This is a slide we used at opening. I said, "Neither</p> <p>13 of these witnesses, the sender or receiver, Dr. Swanson or</p> <p>14 Mr. Billings, could remember what they said here. They had</p> <p>15 no explanation for this monopoly endgame." And I said,</p> <p>16 "Maybe we'll hear from them at trial and we'll learn."</p> <p>17 Well, neither of them testified, so we still don't know.</p> <p>18 But what the document says is that senior executives of</p> <p>19 St. Luke's are talking about this endgame, and that is the</p> <p>20 concern in the relevant markets here, including the hospital</p> <p>21 and facilities markets.</p> <p>22 Your Honor, finally, before I sit down for now, we have</p> <p>23 several slides here which go to the accuracy of some of</p> <p>24 St. Luke's findings. In a few cases, there is less to them</p> <p>25 than meets the eye, and they are at odds with the evidence</p>
<p style="text-align: right;">3723</p> <p>1 they cite, and we've listed those in the slides.</p> <p>2 But that's all for right now, Your Honor.</p> <p>3 THE COURT: Mr. Ettinger, let me ask a question,</p> <p>4 and let's not take this off your time. Somewhere, and it</p> <p>5 may have even been in the briefing or the posttrial</p> <p>6 submissions that have been made -- and, certainly, I think I</p> <p>7 asked some questions along these lines -- but it seems as</p> <p>8 if, you know, that the -- I guess kind of the "arc of</p> <p>9 history," to kind of borrow Mr. Greene, the phrase he was</p> <p>10 using, seems to bend towards perhaps a world in which, at</p> <p>11 least in the Treasure Valley, there are going to be two</p> <p>12 players.</p> <p>13 First of all, I assume you disagree that that's</p> <p>14 inevitable. And when I say "two players," I don't mean only</p> <p>15 two players, but two very dominant players with, you know,</p> <p>16 cumulative market shares of 90 percent, something along that</p> <p>17 order. If that is the case, does that make any difference?</p> <p>18 You've referred to that I need to be aware of not only</p> <p>19 what's happened in the past but what's going to happen in</p> <p>20 the future should the crystal ball extend out 10 and 15</p> <p>21 years to try to predict where the market is going to end up</p> <p>22 with or without this acquisition.</p> <p>23 MR. ETTINGER: Well, Your Honor, I would say,</p> <p>24 number one, crystal balls are pretty unreliable.</p> <p>25 THE COURT: They certainly are.</p>	<p style="text-align: right;">3724</p> <p>1 MR. ETTINGER: And I would not say something that</p> <p>2 is otherwise illegal under the antitrust laws should be</p> <p>3 allowed because on a crystal-ball viewing you might get</p> <p>4 there anyhow.</p> <p>5 Number two, I'd be very cautious about what might and</p> <p>6 might not be inevitable. There are two major hospitals in</p> <p>7 this market, but there are many networks. There are</p> <p>8 independent networks, like IPN. There are many thriving</p> <p>9 independent physician practices today, like Primary Health;</p> <p>10 Dr. Peterman testified here. Until St. Luke's bought some</p> <p>11 of them, there used to be many independent outpatient</p> <p>12 surgery facilities, and there's still one, Treasure Valley,</p> <p>13 so -- and Treasure Valley Surgery Center, which is open. So</p> <p>14 there are -- there may be, in many of the relevant product</p> <p>15 markets, many players, and if there are many players, there</p> <p>16 can be many combinations of players in different networks,</p> <p>17 and that can create competition.</p> <p>18 So I don't think the arc of history takes us anywhere</p> <p>19 in particular, and the antitrust laws say, you know, you</p> <p>20 ought not to assume a result.</p> <p>21 Indeed, Your Honor, the cases I cited about trends</p> <p>22 toward concentration, those cases don't say if there is a</p> <p>23 trend towards concentration say, okay, let it go. Those</p> <p>24 cases say exactly the opposite. They say if there is a</p> <p>25 trend towards concentration, we have to be extra vigilant,</p>

<p style="text-align: right;">3725</p> <p>1 and we need to stop more acquisitions.</p> <p>2 And so what they say, and I think it's the law,</p> <p>3 Your Honor, clearly, is that if you're afraid that the arc</p> <p>4 of history is pointing away from competition, you better do</p> <p>5 something about it, not say that's inevitable.</p> <p>6 THE COURT: Okay. All right. Thank you.</p> <p>7 Actually, I should apologize to Reverend Martin Luther King.</p> <p>8 I think he said it was "the arc of the moral universe" not</p> <p>9 "the arc of history," but I don't know where -- and we</p> <p>10 certainly don't want to get into the moral universe here, I</p> <p>11 don't think.</p> <p>12 Let's take a 15-minute recess. We'll be in recess.</p> <p>13 (Recess.)</p> <p>14 THE COURT: Mr. Wilson.</p> <p>15 MR. WILSON: Thank you, Your Honor.</p> <p>16 Good morning, Your Honor. You asked at the outset</p> <p>17 whether there was a middle ground with regard to remedy. In</p> <p>18 our view, divestiture is a middle ground because it would</p> <p>19 allow Saltzer to compete in whatever network it wants. It's</p> <p>20 already in the St. Luke's BrightPath network, it's already</p> <p>21 in the Saint Al's Alliance. And, in our view, divesting</p> <p>22 Saltzer wouldn't make Saltzer compete in the old world. To</p> <p>23 the contrary, it would allow them to compete in the new</p> <p>24 world.</p> <p>25 And, really, the objective with remedy is to help</p>	<p style="text-align: right;">3726</p> <p>1 restore the benefits of competition that have been</p> <p>2 eliminated by the acquisition. So, in other words, we need</p> <p>3 to do the best we can to put Saltzer in a place where it has</p> <p>4 the best incentive to make independent choices about things</p> <p>5 like referrals. It has the best incentive to make</p> <p>6 independent choices on what network it wants to be in.</p> <p>7 Really, where it has the best incentive to compete with</p> <p>8 St. Luke's. And, respectfully, the only way to accomplish</p> <p>9 that is through divestiture of Saltzer from St. Luke's and</p> <p>10 recision of the professional services agreement.</p> <p>11 Unlike the remedy that's been proposed by the</p> <p>12 defendants, divestiture is easy to administer. The court</p> <p>13 simply orders the transaction unwound. And the case law</p> <p>14 makes clear, Your Honor, that the court really should only</p> <p>15 consider alternative remedies when divestiture is not an</p> <p>16 option. And in this case, the parties have deliberately not</p> <p>17 integrated their operations, and, in addition, they promised</p> <p>18 this court, and they promised the government plaintiffs,</p> <p>19 that divestiture would remain an option.</p> <p>20 And so, respectfully, Judge, we think the court should</p> <p>21 implement that option without hesitation.</p> <p>22 And you asked if that's a sort of winner-take-all</p> <p>23 position. The Idaho Attorney General's Office is not in</p> <p>24 this case to win. The winner of that result, Your Honor,</p> <p>25 would be competition.</p>
<p style="text-align: right;">3727</p> <p>1 And we also submit that the court should create</p> <p>2 safeguards to protect against some of the things that</p> <p>3 Mr. Ettinger was talking about, future anticompetitive</p> <p>4 acquisitions. To accomplish that, we respectfully suggest</p> <p>5 the court should require notice to the government regarding</p> <p>6 future acquisitions, akin to the notice that the FTC</p> <p>7 routinely gets in its consent decrees.</p> <p>8 And then, lastly, should the court find that plaintiffs</p> <p>9 have proven their case, it's important that the court also</p> <p>10 award reasonable costs and attorney fees to the Idaho</p> <p>11 Attorney General and the private plaintiffs. So that's the</p> <p>12 remedy we seek, Judge.</p> <p>13 There are two arguments that I would like to briefly</p> <p>14 address with regard to the remedy that, frankly, the</p> <p>15 defendants are making and have me a bit baffled. The first</p> <p>16 argument that I don't understand is all of this evidence</p> <p>17 about Saltzer's financial condition. In fact, it appears to</p> <p>18 be the only argument against divestiture that the defendants</p> <p>19 are making: That is that the financial condition of Saltzer</p> <p>20 after the unwinding is a reason that the court should not</p> <p>21 order it unwound. We have said it before. We'll say it</p> <p>22 again. We really think that this is a Trojan horse,</p> <p>23 failing-firm defense.</p> <p>24 And before the deal closed, St. Luke's promised the</p> <p>25 government plaintiffs that it would not come into court and</p>	<p style="text-align: right;">3728</p> <p>1 argue that it would be too costly or burdensome to unwind</p> <p>2 this transaction, but yet that's exactly what they're doing.</p> <p>3 So that's my first question: Exactly how is all of this</p> <p>4 evidence about Saltzer's financial condition not a</p> <p>5 failing-firm argument? How is it not an argument that</p> <p>6 unwinding the transaction will be too costly?</p> <p>7 My second question relates to the particular evidence</p> <p>8 that they have chosen to present about Saltzer's financial</p> <p>9 condition. The cornerstone of that argument is the</p> <p>10 purported harm resulting from the divestiture that has been</p> <p>11 caused by the surgeons who departed Saltzer. The court</p> <p>12 probably noticed that when Lisa Ahern testified, when their</p> <p>13 expert testified, her entire unwind analysis really was</p> <p>14 based on the harm caused by those departed surgeons. The</p> <p>15 indirect overhead, the ancillary services, almost all of it</p> <p>16 was based on the harm caused by those surgeons leaving.</p> <p>17 But here's the thing: Those surgeons would not have</p> <p>18 left Saltzer if Saltzer had not decided to do the deal with</p> <p>19 St. Luke's. What makes it worse is that Saltzer knew that</p> <p>20 the St. Luke's deal would cause the surgeons to leave. They</p> <p>21 knew this deal was subject to antitrust challenge, and they</p> <p>22 did it anyway. The CEO of Saltzer, Bill Savage, testified</p> <p>23 the shareholders knew the consequences. Indeed they did.</p> <p>24 No one forced the parties to forge ahead with this deal</p> <p>25 before finding out what the FTC, the Idaho Attorney General</p>

<p style="text-align: right;">3729</p> <p>1 or, more importantly, this court thought about whether the 2 deal would be unlawful. And so they come in here to court, 3 and they tell this court that Saltzer's financial condition 4 is a problem. 5 Your Honor, if the problem occurred because of the 6 merger, the merger ought not to be sustained because of the 7 problem. So that's my second question. Why should the 8 court give any credence to a purported problem that the 9 parties themselves created? I'm certainly going to be 10 listening closely for an answer. 11 In any event, even if the court gives some credence to 12 that evidence, the court has the equitable power to fix the 13 problem through ancillary relief accompanying the 14 divestiture. 15 So having proven our case, Your Honor, even if there 16 were a question about remedy, the cases make clear that the 17 court should resolve that favor in favor of the government. 18 The law also makes clear that divestiture is the best remedy 19 to cure the anticompetitive impact of an unlawful 20 acquisition. 21 But here's the rub, really, when it comes to remedy: 22 Even if you buy their evidence about the financial condition 23 of Saltzer, a weakened Saltzer is a much, much better option 24 than the remedy they propose, and it's not even close. The 25 remedy they propose, these separate negotiating teams, it</p>	<p style="text-align: right;">3730</p> <p>1 wouldn't work. It's ripe for potential collusion, it's been 2 criticized by economists, and it would involve this court in 3 monitoring this case for years to come. Without question, 4 the appropriate remedy here is complete divestiture. The 5 facts warrant it, the law favors it, and, respectfully, the 6 court should order it. 7 Thank you. 8 THE COURT: Thank you. 9 Mr. Bierig. 10 Mr. Bierig, I understood you wanted to, maybe, take a 11 break around 11:45 or so. But I'm completely flexible, so 12 we can either go later or earlier than that. 13 MR. BIERIG: Well, I didn't really have a specific 14 time in mind, Your Honor. There is just one part of my 15 presentation where it would be appropriate to break. I'm 16 not sure what time that we will reach that because I don't 17 know what questions the court is going to ask. So it will 18 be roughly an hour from now is my guess. 19 THE COURT: Okay. That should work. 20 MR. STEIN: Can we turn the screen on, Your Honor? 21 THE COURT: Yes. 22 MR. BIERIG: Good morning, Your Honor. I want to 23 begin by thanking Mr. Metcalf, Ms. Hohenleitner, and 24 Ms. Gearhart, in absentia, and most of all this court for 25 the time and attention that have been devoted to this case</p>
<p style="text-align: right;">3731</p> <p>1 both before commencement of the trial on September 23rd and 2 subsequently. On that date, I represented that the Saltzer 3 affiliation is highly procompetitive in both intent and 4 effect. It is an important part of St. Luke's efforts to 5 compete more effectively in Canyon County and to transition 6 from volume-based to value-based delivery of healthcare in 7 Southern Idaho. 8 For Saltzer, the transaction was essential in enabling 9 it to provide 21st Century medicine to its patients through 10 access to an infrastructure and a compensation arrangement 11 that are available only as part of an integrated delivery 12 system. Without the transaction, Saltzer simply could not 13 have participated as effectively or as meaningfully in the 14 transition to value-based care. 15 The goal for both parties was to effectuate the 16 Triple Aim, to provide better health and better care at a 17 lower cost. Now, I heard Mr. Greene talk about all these 18 things that are going on in other parts of the country. 19 They haven't worked; that's why we have a crisis in this 20 country. And what we are trying to do, what St. Luke's and 21 Saltzer are trying to do, is to solve that problem in our 22 own unique way in the Treasure Valley. And I believe that 23 the evidence adduced at trial strongly suggests that if 24 allowed to go forward, the transaction will have precisely 25 the procompetitive effects that the parties envision.</p>	<p style="text-align: right;">3732</p> <p>1 Yet despite the extremely procompetitive intent of the 2 parties to the transaction, the proposed findings submitted 3 by plaintiffs convey the impression that the affiliation was 4 a nefarious plot by St. Luke's and Saltzer to increase 5 concentration in a supposed market for adult primary care 6 physician services in Nampa in order to raise prices above 7 competitive levels. That misguided view is simply not 8 supported by the facts. 9 At the time the discussions of an affiliation were 10 initiated by Saltzer in 2009, St. Luke's had no 11 pediatricians, no adult primary care physicians, and no 12 acute care hospital in Canyon County. During the course of 13 those discussions, St. Luke's, in late 2011, largely by 14 happenstance, hired seven primary care physicians associated 15 with the Mercy Medical Group when those physicians left 16 Saint Alphonsus and approached St. Luke's in order to avoid 17 a highly restrictive covenant not to compete that Saint 18 Alphonsus was seeking to impose upon them. That is the only 19 reason that there is any horizontal aspect to this case. 20 Absent the hiring of the seven Mercy physicians, this case 21 would involve an entirely vertical transaction. As such, it 22 is readily distinguishable from the cases on which 23 plaintiffs rely, cases such as <i>Philadelphia National Bank</i> 24 where two banks sought to merge, and other cases where two 25 hospitals sought to merge. This is not that kind of case.</p>

<p style="text-align: right;">3733</p> <p>1 Plaintiffs -- plaintiffs put up a slide in their 2 opening statement showing transactions purportedly similar 3 to this one that have been struck down. However, as this 4 slide demonstrates, all of the cases relied upon by 5 plaintiffs involved exclusively horizontal arrangements. 6 Plaintiffs' cases might be on point if St. Luke's had sought 7 to merge with Saint Alphonsus or even with TVH, but they are 8 of only marginal relevance to the largely vertical 9 transaction before this court.</p> <p>10 Plaintiffs have done their best to take out of context 11 a document here and a statement there to try to cobble 12 together a case of unlawful conduct. But the evidence is 13 overwhelming that the purpose of the Saltzer transaction was 14 not to gain or to abuse market share, but to transform the 15 delivery of healthcare in this state by bringing essentially 16 a new product to market. And the evidence is equally 17 overwhelming that this will be the effect of the transaction 18 if it is not nipped in the bud in this lawsuit.</p> <p>19 The evidence has made clear that competition in the 20 delivery of healthcare is alive and well and thriving in the 21 Treasure Valley and that plaintiffs' claims of 22 supracompetitive pricing or vertical foreclosure of 23 competition are entirely without foundation. Two strong 24 systems, St. Luke's and Saint Alphonsus, are vigorously 25 competing against one another, and entities such as TVH and</p>	<p style="text-align: right;">3734</p> <p>1 the Primary Health Medical Group are providing yet 2 additional competition. Physician networks of all stripes, 3 broad networks, narrow networks, networks formed by 4 insurers, networks formed by employers and networks formed 5 by providers are all competing, as well. And now with the 6 entry of SelectHealth into the insurance market and its 7 offering in conjunction with St. Luke's risk-based 8 contracts, there is going to be intense competition in the 9 market for healthcare insurance. There is absolutely no 10 reason to be concerned that the affiliation of Saltzer with 11 St. Luke's will suppress such vibrant competition. Quite to 12 the contrary as the evidence has shown that affiliation has 13 had the effect of causing other providers and insurers, such 14 as Blue Cross, to become more innovative and more 15 competitive.</p> <p>16 Now with those general observations as background, let 17 me turn to the specific evidence. Resolution of this case 18 requires the court to balance the asserted anticompetitive 19 effects of the transaction against the likely procompetitive 20 effects: So I will begin by discussing the supposed 21 anticompetitive effects, first the government's pricing 22 claims and then the private plaintiffs' foreclosure claims. 23 I will then go on to the procompetitive effects of the 24 transaction and plaintiffs' efforts to minimize those 25 effects.</p>
<p style="text-align: right;">3735</p> <p>1 On the first of these issues, the bottom line is that 2 plaintiffs' claim of a likely anticompetitive price increase 3 by virtue of the Saltzer transaction is simply not borne out 4 by the facts. Plaintiffs' evidence on this point consists 5 primarily of a showing that after the Saltzer affiliation, 6 St. Luke's accounts for a very high percentage of services 7 performed by adult primary care physicians in the city of 8 Nampa or, alternatively, in a market consisting of Caldwell, 9 Nampa, and Meridian. But that showing does not meet 10 plaintiffs' burden of establishing likely anticompetitive 11 effects in a properly defined market. And that is so for 12 two reasons.</p> <p>13 First, the geographic market is not so limited. As 14 David Argue testified, a geographic market includes 15 providers who act as competitive constraints on one another. 16 Here the evidence shows that Nampa physicians and physicians 17 elsewhere in the Treasure Valley act as competitive 18 constraints on each other. It is not disputed -- it's not 19 disputed at all -- that one-third of residents of Nampa 20 already travel outside of Nampa for primary care and that 21 roughly one-third of the patients of primary care physicians 22 in Nampa do not reside in that city.</p> <p>23 Plaintiffs have also discounted and have not even 24 mentioned this morning the testimony of Micron executive 25 Pat Otte and others that when Saltzer was out of network</p>	<p style="text-align: right;">3736</p> <p>1 with Micron the vast majority of Micron patients left. It 2 is, of course, true -- it is, of course, true that the 3 defendants -- and defendants have never disputed that all 4 else being equal, people would rather see primary care 5 physicians who practice near their home or near their work, 6 but that fact does not establish Nampa or Nampa and the two 7 adjacent towns along I-84 as the relevant market. Rather, 8 the proper inquiry is this: What would patients do if 9 prices increased by a small but significant amount above 10 competitive levels? And both the fact that a substantial 11 percentage of Nampa residents already leave Nampa for 12 primary care and the fact that Micron employees in Nampa 13 flocked away from Nampa when Saltzer was out of network 14 belies the notion that the relevant market is limited to 15 Nampa.</p> <p>16 THE COURT: Counsel, isn't there a bit of a 17 problem? I probably should have asked this when we were 18 hearing testimony on this issue. But the problem is that at 19 least those who are covered with insurance, the only 20 economic impact upon them is the amount of the copay or 21 their deductible, I guess. But it strikes me that just, 22 generally speaking, because of that fact, people typically 23 are influenced by a lot of noneconomic factors in selecting 24 a physician. And so I'm curious as to how that perceived 25 reality on my part, which is that the -- an increase in the</p>

<p style="text-align: right;">3737</p> <p>1 copay from \$15 to 20 or \$25 or my annual deductible from 250</p> <p>2 to 3- or \$400 is not as noticeable if it's going to require</p> <p>3 that I have to go somewhere else or change doctors. That's</p> <p>4 just a commonsense observation. And --</p> <p>5 MR. BIERIG: That's my point, that a 10- or</p> <p>6 15-dollar increase in copayment led people to leave Nampa</p> <p>7 and go elsewhere.</p> <p>8 THE COURT: Based upon Micron's experience as much</p> <p>9 as anything.</p> <p>10 MR. BIERIG: That's based upon Micron's</p> <p>11 experience, which is the only real experiment we have. The</p> <p>12 rest is all theory. But we know from real experience that a</p> <p>13 10- or 15-dollar increase in copayment causes patients to</p> <p>14 leave Nampa to go to Boise, to go to Meridian. That we know</p> <p>15 from Micron. It's true that even if the market were to</p> <p>16 include Boise, we still would have a not-insignificant</p> <p>17 number of -- not-insignificant market share. But the law is</p> <p>18 clear that the burden is on plaintiffs to establish a</p> <p>19 properly defined market, and this they have not done. As</p> <p>20 the Eighth Circuit held in <i>FTC versus Tenet Healthcare</i>,</p> <p>21 failure to prove a well-defined geographic market is fatal</p> <p>22 to a plaintiff's case.</p> <p>23 Now, second -- and this is very important,</p> <p>24 Your Honor -- more fundamentally, plaintiffs rely very</p> <p>25 heavily on structural presumption as reflected in</p>	<p style="text-align: right;">3738</p> <p>1 market-share numbers, but that approach overemphasizes the</p> <p>2 market definition exercise and fails to examine what's</p> <p>3 really important, which is the actual competitive effects of</p> <p>4 the transaction. And, in this connection, I would cite for</p> <p>5 Your Honor the following statement:</p> <p>6 Quote, the Federal Trade Commission should encourage</p> <p>7 courts to abandon the use of structural presumption first</p> <p>8 announced by the Supreme Court in <i>Philadelphia National</i></p> <p>9 <i>Bank</i>. Such a change would considerably improve courts'</p> <p>10 analysis of mergers and better reflect modern economic</p> <p>11 thinking and empirical evidence."</p> <p>12 Now, that might sound like an argument put forth by</p> <p>13 counsel for defendants in this case, but its author is</p> <p>14 Joshua D. Wright, a commissioner of the Federal Trade</p> <p>15 Commission. Commissioner Wright made this statement on the</p> <p>16 second day of the trial of this case, September 24th, 2013.</p> <p>17 The two reasons that he put forward in support of his</p> <p>18 conclusion are directly relevant to Your Honor's</p> <p>19 consideration of this case. These are his words. These are</p> <p>20 the words of a commissioner of the Federal Trade Commission:</p> <p>21 "First, the structural presumption endorsed by <i>Philadelphia</i></p> <p>22 <i>National Bank</i> does not make economic sense. Modern economic</p> <p>23 learning and empirical evidence does not support the notion</p> <p>24 that mergers that generate a postmerger firm with greater</p> <p>25 than 30 percent share are systematically more likely to be</p>
<p style="text-align: right;">3739</p> <p>1 anticompetitive. Of course, the presumption is a convenient</p> <p>2 litigation tool" -- and I want to emphasize this -- "and one</p> <p>3 that confers some valuable advantages to the antitrust</p> <p>4 agencies and private plaintiffs in their litigation</p> <p>5 efforts to shift the burden to defendants when courts are</p> <p>6 not otherwise persuaded by a competitive effect story. But</p> <p>7 the lodestar of the antitrust laws is not litigation</p> <p>8 victories; it is consumer welfare."</p> <p>9 Commissioner Wright then gave a second reason: "The</p> <p>10 second reason to abandon the presumption is that it is far</p> <p>11 too sensitive to the market-definition exercise. Indeed, it</p> <p>12 is difficult to justify the structural approach when the</p> <p>13 critical lesson of the modern economic approach to mergers</p> <p>14 is that postmerger changes, pricing incentives, and</p> <p>15 competitive effects analysis are what matters."</p> <p>16 Commissioner Wright's thoughts echo similar judicial</p> <p>17 criticism of <i>Philadelphia National Bank</i> that -- the case</p> <p>18 that FTC counsel has relied on so heavily this morning. And</p> <p>19 I would urge Your Honor to consider the judicial criticism.</p> <p>20 As the D.C. Circuit said in <i>Baker Hughes</i>, in a panel</p> <p>21 decision that included two current justices of the Supreme</p> <p>22 Court, that decision, that is, <i>Philadelphia National Bank</i>,</p> <p>23 has been, quote, cut back sharply. And as Judge Posner</p> <p>24 observed in <i>HCA versus FTC</i>, courts no longer rest on the</p> <p>25 very strict merger decisions of the 1960s, like <i>Philadelphia</i></p>	<p style="text-align: right;">3740</p> <p>1 <i>National Bank</i>, but instead, quote, inquire into the</p> <p>2 probability of harm to consumers.</p> <p>3 Nevertheless, in their quest for a litigation victory</p> <p>4 in this case, plaintiffs have offered little more than a</p> <p>5 superficial market-share analysis that depends on Nampa as</p> <p>6 the relevant geographic market and on strained efforts to</p> <p>7 distort the actual facts.</p> <p>8 By contrast, defendants have presented concrete proof</p> <p>9 that the Saltzer transaction will not result in</p> <p>10 supracompetitive prices or in crippling the ability of the</p> <p>11 private plaintiffs to compete either through loss of</p> <p>12 referrals or otherwise. Most importantly, we have presented</p> <p>13 concrete evidence relating to what consumer -- Commissioner</p> <p>14 Wright referred to as, quote, the lodestar of the antitrust</p> <p>15 laws, consumer welfare. I will address consumer welfare in</p> <p>16 greater detail when I discuss the procompetitive benefits.</p> <p>17 But let me start with the government's pricing theory.</p> <p>18 There are at least seven reasons, actually there are eight.</p> <p>19 I'll get to another one later. But there are at least seven</p> <p>20 reasons to conclude that on the actual facts of this case,</p> <p>21 the sterile HHI approach on which plaintiffs rely does not</p> <p>22 portend supracompetitive pricing of healthcare services to</p> <p>23 commercial payors.</p> <p>24 First, the purpose of this transaction was not to</p> <p>25 increase price. To the contrary, it was to enable Saltzer</p>

<p style="text-align: right;">3741</p> <p>1 to practice 21st Century medicine for its patients and to</p> <p>2 enable St. Luke's to take care forward in Canyon County and</p> <p>3 to transition to value-based healthcare delivery throughout</p> <p>4 its service area.</p> <p>5 Second, when Saltzer was independent, it employed</p> <p>6 virtually all of the pediatricians and the majority of adult</p> <p>7 primary care physicians in Nampa, yet there is no, no</p> <p>8 evidence that it was able to raise prices above competitive</p> <p>9 levels.</p> <p>10 THE COURT: Now, it did -- it was able to</p> <p>11 negotiate an increase in reimbursement rates from</p> <p>12 Blue Cross, but it -- on a statewide basis because</p> <p>13 Blue Cross did not differentiate.</p> <p>14 MR. BIERIG: It was able to get the same that</p> <p>15 everyone else in the state got. That's correct. That's</p> <p>16 what it got; it got the same that everyone -- that, we don't</p> <p>17 think, bespeaks market power.</p> <p>18 Third, economic theory, which I'll discuss in a moment,</p> <p>19 suggests that St. Luke's could not profitably raise prices</p> <p>20 above competitive levels.</p> <p>21 Fourth, the Micron natural experiment, which plaintiffs</p> <p>22 have not alluded to today, confirms that St. Luke's could</p> <p>23 not profitably raise prices above competitive levels.</p> <p>24 Fifth, plaintiffs have produced no evidence that any</p> <p>25 past integration of a physician practice by St. Luke's has</p>	<p style="text-align: right;">3742</p> <p>1 led to supracompetitive price increases.</p> <p>2 Sixth, the contract price for 2013-2014 that Blue Cross</p> <p>3 negotiated with St. Luke's, even after Blue Cross knew of</p> <p>4 the Saltzer transaction, further demonstrates that prices</p> <p>5 will not increase above competitive levels.</p> <p>6 And, seventh, the board of St. Luke's regards price</p> <p>7 increases above competitive levels as contrary to the</p> <p>8 Triple Aim and is committed to keeping prices down.</p> <p>9 Before proceeding, I want to digress briefly to</p> <p>10 confront the red herring of increased reimbursement from</p> <p>11 Medicare. This case is not about receiving increased</p> <p>12 reimbursement from Medicare, in accordance with the</p> <p>13 provider-basing regulations which govern payment when a</p> <p>14 previously independent physician practice becomes a hospital</p> <p>15 department in accordance with the Medicare regulation.</p> <p>16 Increased payment, when the regulations have been met,</p> <p>17 reflects Medicare's recognition that a hospital's cost for</p> <p>18 providing services are significantly greater when the costs</p> <p>19 of a physician practice are -- than the cost of a physician</p> <p>20 practice in providing the same services. Any increased</p> <p>21 reimbursement or prediction of increased reimbursement from</p> <p>22 Medicare is not the result of the exercise of market power,</p> <p>23 and any reference to St. Luke's ability to get higher</p> <p>24 payments from Medicare through compliance with the</p> <p>25 provider-basing regulations does not in any way support or</p>
<p style="text-align: right;">3743</p> <p>1 even speak to plaintiffs' claims about the market for</p> <p>2 commercial insurance.</p> <p>3 So now let me address each of the seven reasons why</p> <p>4 abstract references to market-share numbers do not support a</p> <p>5 conclusion that an anticompetitive price increase as a</p> <p>6 result of the Saltzer transaction is likely.</p> <p>7 First, motive. As I noted in my opening statement, the</p> <p>8 Supreme Court has taught, quote, the history of the</p> <p>9 restraint, the evil believed to exist, the reason for</p> <p>10 adopting a particular remedy, the purpose or end sought to</p> <p>11 be attained, are all relevant facts. This is not because a</p> <p>12 good intention will save an otherwise objectionable</p> <p>13 regulation or the reverse, but because knowledge of intent</p> <p>14 may help the court to interpret facts and to predict</p> <p>15 consequences."</p> <p>16 Here, the testimony of Dr. John Kaiser, Tom Patterson,</p> <p>17 and Harold Kunz demonstrates that Saltzer initiated the</p> <p>18 discussion that led to the challenged affiliation for</p> <p>19 absolutely the best of reasons: To become part of an</p> <p>20 integrated delivery system in order to provide</p> <p>21 comprehensive, coordinated, high-value care to patients.</p> <p>22 For its part, St. Luke's has demonstrated through the</p> <p>23 testimony of Dr. David Pate, Skip Oppenheimer, Chris Roth,</p> <p>24 and John Kee, among others, saw the transaction as a way to</p> <p>25 compete more effectively in Canyon County and as an</p>	<p style="text-align: right;">3744</p> <p>1 important step toward transitioning to value-based delivery</p> <p>2 of care. Dr. Pate summarized the points succinctly, quote,</p> <p>3 our consideration was how was this going to advance</p> <p>4 accountable care and the Triple Aim.</p> <p>5 Notably, Saint Alphonsus's own documents reveal that it</p> <p>6 cited much of the same procompetitive reason when it sought</p> <p>7 to acquire Saltzer in 2012. At that time, Saltzer was</p> <p>8 already part of the Saint Alphonsus Health Alliance and,</p> <p>9 therefore, already had a loose affiliation with Saint</p> <p>10 Alphonsus. Yet Sally Jeffcoat, CEO of Saint Alphonsus,</p> <p>11 wrote on January 31st of that year, quote, a more formal</p> <p>12 alignment would accelerate these possibilities and</p> <p>13 facilitate development of a solid integrated model of</p> <p>14 healthcare delivery at the Nampa campuses throughout</p> <p>15 Canyon County and westward."</p> <p>16 Now, despite Ms. Jeffcoat's understanding of the</p> <p>17 procompetitive reasons for an affiliation with Saltzer,</p> <p>18 Saint Alphonsus and its coplaintiffs have, as I predicted</p> <p>19 they would, cherry-picked a handful of documents from among</p> <p>20 the terabytes of data produced in discovery to try to twist</p> <p>21 the facts to fit their erroneous theory that the Saltzer</p> <p>22 transaction was intended to raise prices to commercial</p> <p>23 payors.</p> <p>24 However, selective citations to a few documents that</p> <p>25 don't tell the real story cannot overcome the overwhelming</p>

<p style="text-align: right;">3745</p> <p>1 weight of the evidence regarding the procompetitive purpose</p> <p>2 of the Saltzer transaction. Moreover, upon close</p> <p>3 inspection, none of the documents relied upon by plaintiffs</p> <p>4 evidences anticompetitive intent.</p> <p>5 Plaintiffs point to documents which contain references</p> <p>6 to St. Luke's clout or that mention leverage. Notably, the</p> <p>7 vast majority of these documents were the works of third</p> <p>8 parties at Saltzer's consultants, the Coker Group, but there</p> <p>9 was no testimony at trial that any Saltzer physician agreed</p> <p>10 that the reason for the transaction was to acquire clout or</p> <p>11 leverage or to be able to charge prices above competitive</p> <p>12 levels. Rather, it's just what I said it was: It was to</p> <p>13 try to become part of an integrated delivery system that was</p> <p>14 going to improve the quality of care for patients.</p> <p>15 Now, at trial, plaintiffs -- and today -- plaintiffs</p> <p>16 sought to make much of a document, written by Dr. Randy Page</p> <p>17 of Saltzer and signed by several Saltzer physicians, in</p> <p>18 which it is stated that St. Luke's is the dominant provider</p> <p>19 of healthcare services in the Treasure Valley and that an</p> <p>20 affiliation with St. Luke's would help Saltzer, quote,</p> <p>21 control and codevelop, end quote, St. Luke's services in</p> <p>22 Canyon County.</p> <p>23 For want of anything better, plaintiffs have seized</p> <p>24 upon that document as supposed proof of the anticompetitive</p> <p>25 intent of the transaction. But Dr. Page has explained that</p>	<p style="text-align: right;">3746</p> <p>1 all he meant was that St. Luke's was the preeminent provider</p> <p>2 in the region with whom Saltzer could best partner to</p> <p>3 provider better care and that plaintiffs' fixation on the</p> <p>4 word "dominant" or the word "control" to suggest</p> <p>5 anticompetitive motive does not reflect what he intended by</p> <p>6 those words. Regardless, references to "dominant" and</p> <p>7 "control" as they appear in the context of that letter</p> <p>8 hardly establish that St. Luke's or Saltzer had either the</p> <p>9 purpose or the power to act anticompetitively.</p> <p>10 Plaintiffs have also made reference to a PowerPoint</p> <p>11 presentation to the St. Luke's Treasure Valley board</p> <p>12 showing, quote, Nampa physician market share. Notably, that</p> <p>13 document was not presented to the System Board, but much</p> <p>14 more significantly that document was not intended to be a</p> <p>15 market-share analysis for antitrust purposes. Reference to</p> <p>16 a Nampa physician market share in one document hardly</p> <p>17 establishes that Nampa is a relevant market for purposes of</p> <p>18 antitrust analysis or that the parties entered into the</p> <p>19 Saltzer transaction for anticompetitive purposes.</p> <p>20 Plaintiffs have further relied on documents which</p> <p>21 suggest that St. Luke's and Saltzer anticipated that the</p> <p>22 transaction would lead to increased revenues. Most of those</p> <p>23 documents refer to anticipation of increased revenues as a</p> <p>24 result of compliance with the Medicare provider-basing</p> <p>25 regulations. As I just explained, Your Honor, the parties'</p>
<p style="text-align: right;">3747</p> <p>1 expectations of increased revenues from Medicare has no</p> <p>2 bearing on the issue in this case.</p> <p>3 Plaintiffs can cite to only one set of documents that</p> <p>4 even remotely reflect the possibility of increased prices to</p> <p>5 commercial payors. These documents contain the financial</p> <p>6 modeling performed by St. Luke's consultant, Peter LaFleur.</p> <p>7 Those documents mechanically applied St. Luke's existing</p> <p>8 contract rates to certain of Saltzer's ancillary-services</p> <p>9 volume. Of course, what plaintiffs fail to note is that</p> <p>10 each of those documents includes the following disclaimer:</p> <p>11 Quote, Reimbursement differences represent the upper limit</p> <p>12 of potential changes. Actual results may be materially</p> <p>13 different due to chargemaster, contracting, and other</p> <p>14 factors, which may differ from assumptions used in this</p> <p>15 analysis."</p> <p>16 In other words, all of these changes in that one</p> <p>17 document and series of documents would be subject to</p> <p>18 negotiation with commercial payors. Significantly, none of</p> <p>19 the revenue modeling by Mr. LaFleur speaks of any increase</p> <p>20 in payments from commercial payors for the professional</p> <p>21 services of Saltzer physicians. The only changes in</p> <p>22 commercial payments presented by Mr. LaFleur related to</p> <p>23 laboratory imaging and other ancillary services, but</p> <p>24 plaintiffs have not even made an argument and have not</p> <p>25 presented any evidence that suggested the Saltzer</p>	<p style="text-align: right;">3748</p> <p>1 transaction will result in St. Luke's gaining market power</p> <p>2 in the market for laboratory imaging or other ancillary</p> <p>3 services.</p> <p>4 Here is the important point, Your Honor. If St. Luke's</p> <p>5 or Saltzer had really entered into this transaction for the</p> <p>6 anticompetitive purposes that plaintiffs now ascribe to</p> <p>7 them, the relevant documents would be replete with</p> <p>8 references to such purposes. But the opposite is true.</p> <p>9 There are very few such documents. And that fact speaks</p> <p>10 volumes. As I noted at the outset of this trial, this is a</p> <p>11 case of the dog that did not bark. While good intent does</p> <p>12 not save anticompetitive effect, the procompetitive intent</p> <p>13 of both sides of the challenged transaction should support a</p> <p>14 prediction that anticompetitive consequences are likely to</p> <p>15 ensue.</p> <p>16 Let me move now from intent and concentrate on effect.</p> <p>17 On plaintiffs' view of the geographic market, Saltzer had a</p> <p>18 clear monopoly in the number of pediatricians in Nampa prior</p> <p>19 to the affiliation and well over half the adult primary care</p> <p>20 physicians in that city. If plaintiffs' view of market</p> <p>21 realities were correct, one would expect to have seen proof</p> <p>22 that Saltzer was able to raise prices for primary care</p> <p>23 services above competitive levels before its affiliation</p> <p>24 with St. Luke's. But there is no evidence in this record to</p> <p>25 that effect.</p>

<p style="text-align: right;">3749</p> <p>1 Saltzer negotiated, Saltzer threatened to go out of 2 network, Saltzer did its best to get fees that it thought it 3 deserved, but Blue Cross successfully resisted all of 4 Saltzer's efforts to obtain higher payment or to enter into 5 gainsharing contract in the commercial sector. Nancy 6 Powell, who was Saltzer's CFO until October of 2011 when she 7 became employed by Saint Alphonsus, summed up the situation: 8 "Question: Saltzer never received reimbursement above 9 the statewide fee schedule at any point from Blue Cross, did 10 it? 11 "Answer: For commercially insured, no." 12 So Your Honor is correct; they did get the statewide 13 fee schedule, but that fact hardly bespeaks market power or 14 anticompetitive conduct. 15 The other fact that plaintiffs rely upon is that 16 Saltzer was able to resist a decrease in reimbursement from 17 Regence for participating in Regence's PPO network. Saltzer 18 resisted that decrease because participation in the PPO 19 network was not going to result in steerage of more patients 20 to it, which is the normal reason that providers will cut 21 fees in order to participate in a PPO. In effect, Regence 22 was attempting to force a significant decrease in payment 23 with no basis for doing so. In the end, Regence recognized 24 that participation in its PPO involved no additional benefit 25 to Saltzer and, therefore, agreed to maintain fees where</p>	<p style="text-align: right;">3750</p> <p>1 they had been. That incident hardly establishes that 2 Saltzer had market power. Indeed, if Saltzer had had such 3 power, it could have extracted all sorts of concessions from 4 Blue Cross, but it never did. 5 The inability of Saltzer to raise prices when it had a 6 supposed monopoly of pediatricians in Nampa belies the claim 7 that Nampa is a relevant market. The fact is that patients 8 in Nampa could always have turned to providers in Caldwell, 9 Meridian, and Boise. And knowing this, payors like 10 Blue Cross never paid Saltzer above market price. This 11 history strongly suggests that St. Luke's, facing strong 12 competition from Saint Alphonsus, SAMG, and others, would 13 not be able to raise prices above competitive levels even if 14 it wanted to. 15 The explanation for why Saltzer could not raise prices 16 above competitive levels and why St. Luke's will not do so 17 as a result of the challenged transaction was laid out by 18 defendants' expert, David Argue. Dr. Argue showed that all 19 of the evidence in this case points to the conclusion that a 20 substantial number of Nampa residents already travel to 21 Meridian and Boise for primary medical care and that more 22 would do so if St. Luke's were to raise prices above 23 competitive levels. He, likewise, showed that Nampa 24 physicians draw a substantial number of patients from 25 outside Nampa. As Dr. Argue explained, these facts</p>
<p style="text-align: right;">3751</p> <p>1 demonstrate that providers outside of Nampa act as 2 competitive constraints on Nampa providers or, in other 3 words, a market limited to Nampa is not a proper relevant 4 geographic market for antitrust purposes. 5 By the way, the product market alleged by the 6 government plaintiffs is adult primary care physicians. If 7 it is pediatricians, there is no case here because 8 St. Luke's had no pediatricians in Canyon County prior to 9 the affiliation. That's why I had to chuckle as I listened 10 to counsel for the FTC this morning when he talked about 11 carrying babies from Nampa to Boise. The pediatric market 12 is not even at issue in the government plaintiffs' case. 13 Now, using critical loss analysis, Dr. Argue explained 14 that it would be uneconomic for St. Luke's to raise prices 15 by even 5 percent over market levels if the price increase 16 led to a loss of more -- not 8.8 percent, but more than 1.5 17 percent of patients because when you lose the 8.8 percent of 18 patients, you also lose the revenues from the ancillary 19 services and the hospitalization that goes with that loss. 20 And Dr. Argue testified that based on the fact in the 21 Treasure Valley it is very likely that even a 5 percent 22 increase above market would result in an unacceptably high 23 loss of patients for St. Luke's. 24 Now, plaintiffs point out that he did not offer a 25 prediction as to exactly how many would be lost. No one</p>	<p style="text-align: right;">3752</p> <p>1 could do that. It would be completely ill-founded to make 2 an exact prediction, but it is very clear that greater than 3 1.5 percent of patients would be lost if St. Luke's were to 4 raise prices more than 5 percent over market levels. 5 Plaintiffs never refuted Dr. Argue's analysis. They 6 did point out that Dr. Argue did not define the outer 7 boundary of what he regards as the relevant market. But 8 there are two answers to that point: First, the burden is 9 on the plaintiffs, not on defendants, to define a proper 10 geographic market. Second, the precise outer boundaries of 11 the market don't really matter. What Dr. Argue showed is 12 that whatever those limits might be, the competitive 13 situation in the Treasure Valley makes an anticompetitive 14 price increase highly unlikely. 15 Rather than come to grips with Dr. Argue's analysis, 16 the government plaintiffs relied on the testimony of their 17 own expert, David Dranove. I can summarize the thrust of 18 Dr. Dranove's testimony in a single sentence. Here's that 19 sentence: Any development that increases the bargaining 20 strength of a provider against an insurer is 21 anticompetitive. That was basically what Dr. Dranove said. 22 But increases in bargaining leverage do not determine 23 whether a transaction is anticompetitive. If they did, any 24 combination of providers would be unlawful, and that 25 proposition cannot be correct. Indeed, Dr. Dranove conceded</p>

<p style="text-align: right;">3753</p> <p>1 that there was no objective benchmark to determine when 2 increases in leverage become anticompetitive. 3 Ultimately, he returned to the basic, sterile HHI 4 analysis. His testimony is particularly suspect, given that 5 his former client, Blue Cross of Idaho, has a very large 6 share of the insurance market and can exercise significant 7 countervailing power against any proposed price increase. 8 The basic point here is that Dr. Dranove is incorrect. A 9 transaction is not anticompetitive just because it gives a 10 provider increased leverage with payors; rather, a 11 transaction is anticompetitive if it gives the provider 12 power to raise price above competitive levels. 13 The Ninth Circuit actually stated the correct standard 14 in the <i>Rebel Oil</i> case. It said, "An act is deemed 15 anticompetitive only when it harms both allocative 16 efficiency and raises the prices of goods above competitive 17 levels or diminishes their quality." 18 Significantly, in the four weeks of trial, plaintiffs 19 have never presented any market-based evidence, never 20 presented any market-based evidence, as opposed to HHI 21 numbers, that the Saltzer transaction gives St. Luke's the 22 power to do any of those things. To the contrary, 23 Your Honor. There is important evidence in this case of a 24 natural experiment that provides empirical support for the 25 conclusion that St. Luke's does not have market power, and</p>	<p style="text-align: right;">3754</p> <p>1 that is the Micron experience. 2 In 2008, as this court heard, Micron formed a tiered 3 network that incentivizes patients to see providers in a 4 narrow provider network, known as the Micron Health Partners 5 Network or MHPN. As the Micron presentation on the screen 6 reveals, the incentives of the Micron network resulted in a 7 dramatic shift of patients away from Saltzer and from other 8 non-MHPN providers. Indeed, as Dr. Argue testified and as 9 the next slide will show, the percentage of visits to Nampa 10 pediatricians by Micron employees in Nampa dropped from 48 11 percent to 7 percent. In other words, the financial 12 incentives that Micron implemented didn't just cause 13 patients to switch providers; they led Nampa residents to 14 leave Nampa for pediatric care. 15 The testimony of Dr. Harold Kunz reveals that the same 16 phenomenon occurred with respect to adult primary care 17 physicians. When Saltzer was not included in the MHPN, the 18 number of his Micron patients plummeted from 60 to 1. As he 19 testified, those patients went to Meridian and to Boise. 20 The Micron experiment provides real-world evidence that 21 patients in the Treasure Valley will react to small but 22 significant price increases by shifting away from the 23 provider that imposes the increase and will, thereby, defeat 24 an anticompetitive price rise in accordance with the 25 critical loss analysis.</p>
<p style="text-align: right;">3755</p> <p>1 But the Micron story is important not only for Saltzer 2 and for physician practices; it's also important for the 3 lesson it teaches St. Luke's. The Micron network also 4 excluded St. Luke's hospital. As this slide shows being out 5 of network caused St. Luke's to experience a dramatic 6 decrease in usage by Micron employees. Specifically, that 7 usage dropped from 75 percent to 10 percent. St. Luke's is 8 well aware that it can expect a similar result, but only on 9 a dramatically larger scale, if it were to go out of network 10 for Blue Cross. After all, Blue Cross represents a far 11 greater portion of St. Luke's revenues than Micron did. 12 As Dr. Argue testified, if St. Luke's has to contract 13 with Blue Cross, as clearly it must, then any incremental 14 bargaining leverage that St. Luke's may realize from the 15 Saltzer transaction is irrelevant. As this graphic shows, 16 St. Luke's, quote, best alternative to a negotiated 17 agreement with Blue Cross is no alternative at all." 18 Now, plaintiffs offer two explanations for the Micron 19 experiment; neither is persuasive. First, they say that 20 Micron is unique, that Micron was so desperate in 2008 that 21 it took draconian measures that no one else would take. 22 Well, there are two short rejoinders to that theory, 23 Your Honor: Micron and Walmart. Even after Micron's 24 economic situation improved dramatically, it has continued 25 to offer its narrow network. Saltzer was not included in</p>	<p style="text-align: right;">3756</p> <p>1 any tier of the Micron health plan from 2008 to 2011, and it 2 is still not today in the MHPN. 3 In these circumstances, any suggestion that without 4 Saltzer Micron is going to continue its plan -- discontinue 5 its plan or that networks cannot function without Saltzer is 6 completely incorrect and not credible. 7 Further, if Micron is so unique, why has Walmart 8 recently joined the Micron network? And going beyond 9 Walmart, if Micron and Walmart are so unique, why have 10 Thomas Cuisine and Paul's Markets recently implemented 11 narrow network products that direct patients to Saint 12 Alphonsus? It's, undoubtedly, true that narrow networks are 13 currently outnumbered by broad networks, but as counsel for 14 Saint Alphonsus wrote to the Federal Trade Commission in the 15 summer of 2012, quote, Healthcare reform and clinical 16 advancement are inextricably linked to narrow networks, end 17 of quote. 18 Plaintiffs' second argument, advanced by Dr. Dranove, 19 is that Micron tells us nothing because the percentage price 20 increase to patients was greater than 5 percent. That, 21 however, is the exact wrong way to look at it, and this is 22 what Your Honor was asking. If a copayment went from one 23 dollar to two dollars, it would have increased by 100 24 percent. But so what? The better question is the question 25 that Your Honor posed: How much more money, in absolute</p>

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1 terms, would a price increase cost the patient? And here,
2 as we've discussed, that increase in absolute terms for
3 purposes of seeing a Saltzer physician was on the order of
4 10 or \$15 per visit, yet this differential was enough to
5 cause a monumental loss to Saltzer.

6 The lesson is clear relatively small price increases
7 for primary care physicians will not be tolerated in this
8 area. I remember Mr. Deal, Director Deal, saying how price
9 conscious consumers in Nampa are. As Dr. Argue explained,
10 all that it takes to make a price increase unprofitable is
11 loss of a relatively small volume of patients, 1.5 percent
12 or so.

13 As Dr. Argue also explained, payors have the power to
14 set copayments and deductibles so as to incentivize patients
15 to use certain providers. That is exactly what Micron,
16 Walmart, Paul's Market, Thomas Cuisine, and others are
17 doing.

18 One more point before I leave Micron, Your Honor.
19 Plaintiffs argue that St. Luke's has resisted competing on
20 price for the Micron business. That is just not true. What
21 the evidence shows is that since St. Luke's was excluded
22 from the Micron network, it has competed vigorously to try
23 to get back into that network. It has offered discounted
24 fee-for-service arrangements, and as Mr. Otte himself
25 acknowledged, it even offered a full risk-based arrangement

1 in which St. Luke's would guarantee Micron that its
2 healthcare costs would not increase for several years. The
3 fact is that competition from St. Luke's has required Saint
4 Alphonsus to offer the discount that it has offered to the
5 benefit of Micron.

6 But this is the first of plaintiffs' three Catch-22
7 arguments. If St. Luke's gets Micron's business, plaintiffs
8 will say that it has market power because it is a must-have
9 provider. If St. Luke's doesn't get Micron's business
10 because it chooses not to get into a fee-for-service bidding
11 war but rather offers to move to a value-based contract,
12 plaintiffs say St. Luke's has market power because it
13 disdains competition. According to plaintiffs, no matter
14 what St. Luke's does, it proves that St. Luke's has market
15 power. Joseph Heller would be very proud of plaintiffs.

16 The history of physician practices that have joined
17 St. Luke's further undermines plaintiffs' theories. The
18 lesson of those affiliations is quite simple. There is no
19 evidence, absolutely none, that any past integration of
20 physician services in the Treasure Valley has led to
21 anticompetitive price increases to commercial payors.

22 When St. Luke's hired the physicians with the Mercy
23 Medical Group in Nampa in 2011, there was no increase in
24 price to commercial payors. Indeed, Blue Cross's own
25 internal analysis shows -- and this is on slide 28 -- that

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1 every single affiliation of a physician practice with
2 St. Luke's has resulted either in no change or a decrease in
3 commercial reimbursement for physician services. You can
4 see that from the -- from the chart, Your Honor.

5 THE COURT: When you say there was no increase to
6 commercial payors, are you excluding insurance companies
7 from that?

8 MR. BIERIG: I am including insurance companies.
9 There was no increase.

10 THE COURT: There was no change in the way the
11 doctors were --

12 MR. BIERIG: There was either no change or a
13 decrease, in some situations.

14 THE COURT: All right.

15 MR. BIERIG: As to the Magic Valley, there is,
16 once again, absolutely no proof of any anticompetitive price
17 increase after affiliation with St. Luke's. To the
18 contrary, after St. Luke's merger with Twin Falls hospital
19 and its affiliation with the aligned physicians of that
20 hospital, St. Luke's actually persuaded those physicians to
21 accept lower reimbursement and to join the Blue Cross PPO
22 there. With respect to IPN, I'll quote plaintiffs' own
23 proposed corrected finding of fact No. 244, which is set
24 forth on slide 29, quote, here is how they put it,
25 St. Luke's was able to negotiate a favorable deal with IPN

1 in the Magic Valley securing a raise in fees up to the
2 maximum allowed by the statewide fee schedule."

3 To put the point in slightly more objective terms, IPN
4 agreed that it would pay Magic Valley providers the same as
5 it paid everyone else in the state. That's far from
6 evidence of negotiating above-market payments.

7 In any event, there is a critical difference between
8 the Treasure Valley and the Magic Valley such that the
9 Magic Valley is not a reliable predictor of competitive
10 effects here in the Treasure Valley where the demographics
11 are very different, where St. Luke's faces intense
12 competition from Saint Alphonsus, and where Saint Alphonsus
13 owns the only hospital in Nampa.

14 In short, Your Honor, the history of physician
15 practices that have joined St. Luke's gives absolutely no
16 reason to believe that prices will increase to
17 anticompetitive levels by virtue of the Saltzer affiliation.

18 In this connection, as shown on slide 30, it is quite
19 noteworthy that plaintiffs' experts were unable to testify
20 that they had done an analysis showing that any physician
21 practice -- that after any physician practice joined
22 St. Luke's, the prices for physician services to commercial
23 payors increased above competitive levels. That question
24 was put directly to them, and they both acknowledged that
25 they had done absolutely no analysis as to whether any price

<p style="text-align: right;">3761</p> <p>1 increase was anticompetitive.</p> <p>2 Now, let me invoke an oxymoron -- I kind of like this</p> <p>3 one -- future history. No one can, of course, foretell the</p> <p>4 future with certainty. But we do know the rates that</p> <p>5 Blue Cross negotiated with St. Luke's at the end of 2012 for</p> <p>6 the years 2013 and 2014 in full contemplation and with full</p> <p>7 knowledge of the Saltzer transaction. Those rates supersede</p> <p>8 the speculative projections of the impact of the Saltzer</p> <p>9 transaction that Blue Cross prepared in the summer of 2012,</p> <p>10 projections that did not take into account the contractual</p> <p>11 protections that Blue Cross extracted from St. Luke's for</p> <p>12 increases resulting from the addition of any physician</p> <p>13 practices.</p> <p>14 Significantly, none of plaintiffs' experts have even</p> <p>15 tried to take the position that the price increases that</p> <p>16 were negotiated with full knowledge by Blue Cross of the</p> <p>17 Saltzer transaction are supracompetitive. That's another</p> <p>18 dog that is not barking. To the contrary, Dr. Argue</p> <p>19 demonstrated that St. Luke's reimbursement rates from</p> <p>20 Blue Cross are consistent with previous contracts and well</p> <p>21 within the range of what Blue Cross is paying to other</p> <p>22 providers in the region. The fact that there has not been</p> <p>23 an anticompetitive price increase in contracts that have</p> <p>24 been signed, even when the full facts of the Saltzer</p> <p>25 transaction were known, should say something.</p>	<p style="text-align: right;">3762</p> <p>1 Plaintiffs' efforts to explain this inconvenient truth</p> <p>2 produces their second Catch-22 scenario. According to</p> <p>3 plaintiffs, there was no anticompetitive price increase</p> <p>4 because, as they put it, quote, the cop was on the beat, end</p> <p>5 of quote. So a showing of anticompetitive price increases,</p> <p>6 according to the plaintiffs, is not necessary. Even if</p> <p>7 St. Luke's doesn't raise prices above competitive levels, it</p> <p>8 has market power. As I said before, Joseph Heller would be</p> <p>9 proud, indeed.</p> <p>10 Now, let me say a word about Blue Cross. Blue Cross</p> <p>11 has vigorously opposed the Saltzer affiliation, and no</p> <p>12 wonder: It is extremely threatened by SelectHealth and the</p> <p>13 value-based plans that it will offer through its alliance</p> <p>14 with St. Luke's, which is very much advanced by the Saltzer</p> <p>15 affiliation.</p> <p>16 Let's look at Blue Cross's own document from August</p> <p>17 20th -- oh, this is AEO. Sorry. Take a look, Your Honor.</p> <p>18 Sorry.</p> <p>19 Just take a look at Blue Cross's own document from</p> <p>20 August 20th, 2012. Your Honor will see that they are very,</p> <p>21 very concerned about the entry of SelectHealth, and that</p> <p>22 they are trying to figure out how to --</p> <p>23 THE COURT: What is the source of -- that</p> <p>24 apparently is a Saint Al's document?</p> <p>25 MR. BIERIG: This is a Blue Cross document.</p>
<p style="text-align: right;">3763</p> <p>1 THE COURT: All right. I'm sorry. It's obvious</p> <p>2 from the context. I just -- I couldn't -- it wasn't obvious</p> <p>3 from -- until I read it. Thank you.</p> <p>4 MR. BIERIG: Notably, plaintiffs have offered</p> <p>5 nothing to support the conclusion that the Saltzer</p> <p>6 transaction will diminish Blue Cross's strength in the</p> <p>7 market, and they have offered no proof that the transaction</p> <p>8 has led to supracompetitive pricing.</p> <p>9 So, thus far, I've talked about motive, and I've talked</p> <p>10 about effect. I've reviewed the evidence of why St. Luke's</p> <p>11 could not implement above-market prices even if it wanted</p> <p>12 to. But the fact is that it does not want to. We know this</p> <p>13 from the procompetitive purpose of the Saltzer transaction,</p> <p>14 as discussed above. And we also know it from St. Luke's</p> <p>15 System Board member, Skip Oppenheimer, who testified that</p> <p>16 raising prices above competitive levels would be contrary to</p> <p>17 St. Luke's goal of effectuating the Triple Aim. A key</p> <p>18 element of which is lower cost.</p> <p>19 Now, I'm aware --</p> <p>20 THE COURT: Can I bring it back up?</p> <p>21 MR. STEIN: Yes, Your Honor.</p> <p>22 MR. BIERIG: I'm aware, Your Honor, that during</p> <p>23 the trial, the court expressed skepticism as to whether</p> <p>24 nonprofits operate any differently from for-profits.</p> <p>25 THE COURT: I asked that question about that, and</p>	<p style="text-align: right;">3764</p> <p>1 the response was skeptical whether they did. I'm not --</p> <p>2 MR. BIERIG: And people have rightly raised that</p> <p>3 issue. Courts have raised that issue. But the point I'm</p> <p>4 making here is not a function of St. Luke's nonprofit</p> <p>5 status; rather, it stems from the fact that anticompetitive</p> <p>6 pricing would be directly contrary to the third pillar of</p> <p>7 the Triple Aim, to which St. Luke's is completely committed:</p> <p>8 lower cost. And it also stems from the fact that St. Luke's</p> <p>9 is the only locally based and locally governed healthcare</p> <p>10 system in Idaho. Every member of the St. Luke's System</p> <p>11 Board lives in this state and is part of this community.</p> <p>12 Several are executives of Idaho companies which would have</p> <p>13 to absorb the cost of any supracompetitive prices.</p> <p>14 In these circumstances, Your Honor, I would</p> <p>15 respectfully submit that the observation of the court in <i>FTC</i></p> <p>16 <i>versus Butterworth</i> is fully applicable here. Quote, The</p> <p>17 involvement of prominent community and business leaders can</p> <p>18 be expected to bring real accountability for price</p> <p>19 structuring."</p> <p>20 In short, for all seven reasons, and for an eighth</p> <p>21 reason that I will get to when we deal with procompetitive</p> <p>22 effects, it is highly improbable that the effect of the</p> <p>23 Saltzer transaction will be to raise prices above</p> <p>24 competitive levels as the government plaintiffs on the basis</p> <p>25 of little more than sterile HHI numbers and speculation ask</p>

<p style="text-align: right;">3765</p> <p>1 this court to find.</p> <p>2 So let me move now to the theory of the private</p> <p>3 plaintiffs. These plaintiffs lack standing to assert a</p> <p>4 pricing claim since, as competitors of St. Luke's, they</p> <p>5 stand to benefit from any high prices that St. Luke's would</p> <p>6 allegedly charge. Their theory, therefore, is not based in</p> <p>7 any way on anticompetitive pricing; rather, their theory is</p> <p>8 that the Saltzer transaction will so cripple them that</p> <p>9 competition itself will be suppressed. Notably, the</p> <p>10 government plaintiffs have explicitly declined to join in</p> <p>11 this -- in this theory and with good reason. The record is</p> <p>12 devoid of any evidence that these plaintiffs will be so</p> <p>13 injured by the transaction that they will be unable to</p> <p>14 compete effectively.</p> <p>15 The basic argument of the private plaintiffs is nothing</p> <p>16 more than that the Saltzer transaction will cause them to</p> <p>17 lose referrals from Saltzer physicians. But loss of</p> <p>18 referrals from one source is of no moment for antitrust</p> <p>19 purposes unless that loss is so great that it suppresses</p> <p>20 competition. The correct inquiry is whether as a result of</p> <p>21 the Saltzer transaction the private plaintiffs will lose and</p> <p>22 be unable to replace so much volume that they can no longer</p> <p>23 compete effectively.</p> <p>24 Nothing in this record, Your Honor, even remotely</p> <p>25 indicates that this will occur; rather, the evidence reveals</p>	<p style="text-align: right;">3766</p> <p>1 that the private plaintiffs have not lost nearly as many</p> <p>2 referrals as they claim, that those referrals that they have</p> <p>3 lost have been more than made up for by referrals from other</p> <p>4 sources within the market, and that both private plaintiffs</p> <p>5 are in a very, very strong competitive position.</p> <p>6 In an attempt to avoid these unavoidable conclusions,</p> <p>7 the private plaintiffs called Deborah Haas-Wilson as their</p> <p>8 expert. Dr. Haas-Wilson correctly acknowledged that the</p> <p>9 antitrust laws protect competition, not competitors. But</p> <p>10 she then made the astounding assertion that anything that</p> <p>11 harms Saint Alphonsus or TVH as competitors harms</p> <p>12 competition. Through this sleight of hand, she took the</p> <p>13 position that because a Saltzer transaction may result in</p> <p>14 fewer referrals to Saint Alphonsus, the transaction harms</p> <p>15 competition. Of course, competition always harms the</p> <p>16 less-effective competitor. In effect, Dr. Haas-Wilson is</p> <p>17 taking the position, the nifty position, that competition</p> <p>18 harms competition if it somehow harms Saint Alphonsus or</p> <p>19 TVH.</p> <p>20 Plaintiffs proposed findings of fact go even farther.</p> <p>21 According to plaintiffs, anything that gives an advantage to</p> <p>22 St. Luke's harms competition.</p> <p>23 Let's take a look at plaintiffs' proposed corrected</p> <p>24 finding 810, shown here on slide 37. Plaintiffs ask this</p> <p>25 court to find that, quote, Any greater competitive advantage</p>
<p style="text-align: right;">3767</p> <p>1 to St. Luke's will harm competition, end quote. This sort</p> <p>2 of contention reveals that plaintiffs regard any successful</p> <p>3 competition by St. Luke's as anticompetitive.</p> <p>4 THE COURT: Well, Counsel, let me just ask a</p> <p>5 question about that. If -- in a market in which there are</p> <p>6 not a lot of players, in other words, not a lot of</p> <p>7 alternatives for a consumer, that statement could be fairly</p> <p>8 accurate, that if -- let's say that there are only two</p> <p>9 competitors, anything that would harm a single competitor in</p> <p>10 that market, assuming that there's not other alternatives --</p> <p>11 so I guess it's that elasticity of demand -- that there's</p> <p>12 just not any other options to go to, that statement is</p> <p>13 fairly accurate, is it not?</p> <p>14 MR. BIERIG: I don't think it would be accurate at</p> <p>15 all. The question is whether the competitor is so harmed</p> <p>16 that it can't compete. If it was marginally harmed, if it</p> <p>17 lost some referrals, that would not harm competition in the</p> <p>18 slightest bit.</p> <p>19 So what they're saying is that anything that gives us a</p> <p>20 competitive advantage harms competition, the essence of</p> <p>21 competition is to try to harm your rival, is to try to do</p> <p>22 better than your rival. And what they're basically saying</p> <p>23 is for St. Luke's to be stopped from competing. We have in</p> <p>24 this market two very strong competitors, and several other</p> <p>25 competitors who are doing a very good job, and in this</p>	<p style="text-align: right;">3768</p> <p>1 market the thought that St. Luke's should not be allowed to</p> <p>2 try to gain competitive advantage is completely</p> <p>3 anticompetitive.</p> <p>4 THE COURT: So if a player in the market with only</p> <p>5 two real competitors has 90 percent of the market share and</p> <p>6 they are still free to do anything they want to to make it</p> <p>7 more difficult for the small player to compete because</p> <p>8 that's just part of competition.</p> <p>9 MR. BIERIG: No. They can't engage in unfair</p> <p>10 practices or predatory practices. They can't do that, but</p> <p>11 they can certainly try to compete effectively. And, of</p> <p>12 course, we're not dealing with a 90 percent player.</p> <p>13 THE COURT: Well, I know. I realize that.</p> <p>14 MR. BIERIG: As I was saying, Your Honor, the only</p> <p>15 circumstance in which vertical foreclosure actually harms</p> <p>16 the competitive process is when it forecloses a substantial</p> <p>17 share of the overall market. Here the private plaintiffs</p> <p>18 contend that the transaction will foreclose them from a</p> <p>19 competitively significant portion of the volume of available</p> <p>20 referrals for inpatient and outpatient services in all of</p> <p>21 Ada and Canyon County. But in order to assess that claim,</p> <p>22 the court must look not simply to Saltzer referrals, but to</p> <p>23 the significance of the Saltzer referrals relative to the</p> <p>24 overall referrals available in the market.</p> <p>25 Plaintiffs have provided not a shred of evidence as to</p>

<p style="text-align: right;">3769</p> <p>1 the percentage of overall referrals that Saltzer referrals 2 represent. Dr. Haas-Wilson admitted that she didn't even 3 look at the number of referrals available in the market 4 overall. That admission alone is fatal to the claim of the 5 private plaintiffs. And even more tellingly, these 6 plaintiffs have made no effort to counter the fact that 7 whatever losses and referrals they experienced from Saltzer 8 were made up in referrals from other sources. 9 I'm about to show a couple of AEO slides, so I'm going 10 to ask Your Honor to blank the screen. 11 The testimony of TVH CEO, Nick Genna, is very telling. 12 Mr. Genna testified that surgeries at TVH have fallen off 13 substantially since Saltzer affiliated with St. Luke's. 14 What Mr. Genna failed to mention was that at approximately 15 the same time that St. Luke's and Saltzer affiliated, TVH 16 opened Treasure Valley Surgery Center. As slide 38 shows, 17 Your Honor, many procedures formerly performed at TVH are 18 now performed at TVSC. Indeed, we have shown that the total 19 volume of surgeries performed at the Treasure Valley 20 facilities has not dropped one iota. In fact, 21 notwithstanding the decrease in surgeries by Saltzer 22 surgeons, TVH and TVSC are on track to do far more 23 procedures this year than last year. 24 And look at these financials. TVH is on pace to have 25 its best year ever, financially, in 2013, the year after the</p>	<p style="text-align: right;">3770</p> <p>1 Saltzer transaction. Under no reasonable interpretation of 2 the antitrust laws does this evidence support a finding of 3 anticompetitive foreclosure. 4 Saint Alphonsus's foreclosure claims suffer from the 5 same defect -- I think we can bring the screen up 6 now -- Saint Alphonsus's foreclosure claims suffer from the 7 same defect. Professor Haas-Wilson's foreclosure opinion 8 rests largely on her analysis showing that after surgical 9 practices joined St. Luke's in the past -- yeah, I asked for 10 the screen to come back. 11 THE COURT: You want it back on? 12 MR. BIERIG: Yes. 13 THE COURT: Okay. 14 MR. BIERIG: Her analysis rests on the showing 15 that after surgical practices joined St. Luke's, the 16 surgeons ceased doing surgeries as Saint Alphonsus. But as 17 defendants have demonstrated, decreases in procedures at 18 Saint Alphonsus by those surgeons were offset by increased 19 procedures by other surgeons -- as this document shows -- 20 largely because Saint Alphonsus's primary care physicians 21 stop referring cases to St. Luke's surgeons and started 22 referring them to other surgeons at Saint Alphonsus. Thus, 23 the analysis of surgery practices does not support a finding 24 that past physician integrations led to foreclose at all. 25 All it shows is that different people are doing the same</p>
<p style="text-align: right;">3771</p> <p>1 amount of surgeries. It's certainly doesn't show 2 anticompetitive foreclose. 3 Unlike Professor Haas-Wilson, Dr. Argue and Lisa Ahern 4 analyzed whether there has been any significant change in 5 referrals to Saint Alphonsus by primary care groups who 6 affiliate with St. Luke's, which is really the more relevant 7 inquiry here. Their analyses based on both payor data, as 8 shown on slide 41, and Saint Alphonsus's internal data 9 demonstrate that there has been no significant change. 10 Dr. Argue's analysis using payor data demonstrated that 11 there was virtually no change in the volume of referrals by 12 primary care physicians to Saint Alphonsus after 13 affiliations with St. Luke's. Ms. Ahern's analysis showed 14 only slight decreases, ranging from 9 percent to 23 percent 15 of referrals by such physicians. 16 THE COURT: Counsel, apart from what the numbers 17 show, there is an intuitive sense that if the -- at least 18 one of the goals of the merger, or any merger, is to obtain 19 clinical integration, that concept of clinical integration 20 suggests there is going to be steering towards physicians 21 within the group with which you're integrated. Isn't that a 22 fair assumption that that's at least one of the objectives? 23 And if that is the case, why would that not result in, 24 somehow, a change in referral patterns that would have some 25 impact upon non-St. Luke's specialists?</p>	<p style="text-align: right;">3772</p> <p>1 MR. BIERIG: Well, over the long term, Your Honor, 2 the hope is -- and it will not be through steerage -- the 3 hope is that physicians who are associated with St. Luke's 4 will send their patients to St. Luke's because it's better 5 for those patients. That is going to be a long-term 6 development. And, of course, Saint Alphonsus is going to do 7 the same thing. They are building their own system, and 8 they will be expecting their physicians to -- to basically 9 make referrals within their system. But that's a long-term 10 development, which is really competition at work. There is 11 nothing -- there is absolutely nothing that St. Luke's has 12 done to require or even encourage its physicians to steer 13 patients away from Saint Alphonsus or Saint Alphonsus 14 physicians. So -- 15 THE COURT: Well, I understand that. But part of 16 my concern, of course, is that -- you know, again, I don't 17 know all of the time frames in which these acquisitions took 18 place, but the fact that the -- there was at least some 19 suggestion of the State of Idaho's concern, the Federal 20 Trade Commission's concern, Saint Al's perhaps rattling 21 sabers, I guess I'm a little concerned that maybe that's not 22 a very good snapshot to take as far as what the patterns 23 were over the last couple of years, and more -- we just need 24 to look at, intuitively, that if the goal here is clinical 25 integration, that is going to affect referral patterns.</p>

<p style="text-align: right;">3773</p> <p>1 MR. BIERIG: Well, over time it certainly may.</p> <p>2 But if you look at this slide, Your Honor, these figures go</p> <p>3 back to 2007. These figures show that over a five-year</p> <p>4 period -- you know, over a five-year period there really has</p> <p>5 not been a significant loss of referrals to Saint Alphonsus</p> <p>6 facilities.</p> <p>7 And I would note, Your Honor, that it is clear, it is</p> <p>8 absolutely -- it's not even disputed that St. Luke's has not</p> <p>9 imposed any restrictions on the freedom of Saltzer</p> <p>10 physicians to make referrals to plaintiff hospitals or to</p> <p>11 physicians associated with plaintiff hospitals; quite to the</p> <p>12 contrary. Numerous Saltzer physicians, Dr. Kaiser,</p> <p>13 Dr. Patterson, Dr. Kunz, have all testified that</p> <p>14 particularly with Saint Alphonsus owning the only hospital</p> <p>15 in Nampa, it was of utmost importance that they be able to</p> <p>16 make referrals as they saw fit in the best interests of</p> <p>17 their patients. And St. Luke's readily agreed that these</p> <p>18 physicians would have complete discretion to make referrals</p> <p>19 as they deem appropriate.</p> <p>20 The evidence is incontrovertible that these physicians</p> <p>21 have continued -- these Saltzer physicians, who we're</p> <p>22 talking about in this case, have continued to send</p> <p>23 substantial numbers of patients to Saint Alphonsus Nampa,</p> <p>24 and the reason for that is so obvious. Saint Alphonsus</p> <p>25 Nampa is the only hospital in that whole area, so, of</p>	<p style="text-align: right;">3774</p> <p>1 course, those physicians are free and should be free to make</p> <p>2 referrals as to what's in the best interests of their</p> <p>3 patients. Over time, some years from now, St. Luke's may be</p> <p>4 building a facility in Nampa or elsewhere in Canyon County,</p> <p>5 and we certainly hope that these doctors will realize that</p> <p>6 their patients will get better care in a St. Luke's</p> <p>7 facility. But that's competition. That's not</p> <p>8 anticompetitive.</p> <p>9 If we can show that their care is -- that the care for</p> <p>10 their patients will be better because they're part of an</p> <p>11 integrated delivery system at St. Luke's, that's</p> <p>12 competition. That's not something that we are forcing</p> <p>13 doctors not to compete -- excuse me, not to refer to any</p> <p>14 Saint Alphonsus facility. And, indeed, this chart that</p> <p>15 we're talking about and this testimony of these physicians</p> <p>16 of Saltzer demonstrate that this is really not a problem.</p> <p>17 Now, Dr. Haas-Wilson did a study purporting to show</p> <p>18 that when physician practices have joined St. Luke's,</p> <p>19 referrals to Saint Alphonsus dropped to essentially nothing</p> <p>20 and, thereby, threatened the ability of Saint Alphonsus to</p> <p>21 compete. However, as we showed at trial, that study is</p> <p>22 based on the assumption that if a St. Luke's physician is</p> <p>23 not listed as the admitting physician, he or she did not</p> <p>24 make the referral.</p> <p>25 In fact, the evidence shows that most primary care</p>
<p style="text-align: right;">3775</p> <p>1 physicians don't admit patients themselves to Saint</p> <p>2 Alphonsus Nampa but rather rely on a hospitalist at that</p> <p>3 facility. In these situations, a hospitalist at Saint</p> <p>4 Alphonsus is listed as the admitting physician even though</p> <p>5 and even when a St. Luke's physician made the referral to</p> <p>6 the hospitalist and even when the St. Luke's physician made</p> <p>7 the decision to send the patient to Saint Alphonsus.</p> <p>8 Indeed, the role of the hospitalist is to admit and see</p> <p>9 patients who have been referred for admission by the primary</p> <p>10 care physician, the specialist, or the emergency room. So</p> <p>11 Dr. Haas-Wilson's study is based on completely inaccurate</p> <p>12 assumptions and has no, zero probative value.</p> <p>13 These facts and the fact that the Saltzer physicians</p> <p>14 are continuing to send patients to Saint Alphonsus Nampa in</p> <p>15 very significant numbers totally undermine the analysis by</p> <p>16 Saint Alphonsus CFO, Lannie Checketts, that purports to show</p> <p>17 that the loss of referrals from the Saltzer transaction</p> <p>18 would have a devastating impact on its ability to compete.</p> <p>19 As defendants' expert Lisa Ahern persuasively</p> <p>20 demonstrated, that study, that is the Checketts study, was</p> <p>21 based on worst-case scenarios that have no grounding in</p> <p>22 reality. Specifically, that all referrals from Saltzer</p> <p>23 physicians to Saint Alphonsus Nampa would immediately,</p> <p>24 completely, and irrevocably cease as a result of the</p> <p>25 affiliation. The evidence has borne out that that</p>	<p style="text-align: right;">3776</p> <p>1 assumption is not even close to being true.</p> <p>2 We've heard testimony from many physicians who have</p> <p>3 testified that they are continuing to send lots and lots of</p> <p>4 patients to Saint Alphonsus Nampa, as you would expect,</p> <p>5 since that's the only hospital in that area.</p> <p>6 This is significant because even Mr. Checketts and</p> <p>7 Dr. Haas-Wilson acknowledge that if the loss of referrals</p> <p>8 were 30 percent or less, they could not say what the effect</p> <p>9 on Saint Alphonsus would be. Thus, the Checketts analysis</p> <p>10 cannot be the basis of any legitimate finding that the</p> <p>11 Saltzer transaction will cripple Saint Alphonsus's ability</p> <p>12 to compete.</p> <p>13 But even if it were true, even if it were correct --</p> <p>14 which it clearly is not -- harm to one of the seven</p> <p>15 hospitals that compete in Ada and Canyon County, the one</p> <p>16 Saint Alphonsus outpost does not constitute harm to</p> <p>17 competition.</p> <p>18 The hospital plaintiffs also say that St. Luke's will</p> <p>19 put Saltzer out of various networks and, thereby, destroy</p> <p>20 their ability to compete. This claim is quite ironic,</p> <p>21 indeed, given that Saint Alphonsus documents, for example</p> <p>22 the one shown on slide 43 -- this is AEO, too?</p> <p>23 THE COURT: I'm sorry?</p> <p>24 MR. BIERIG: We have to go onto AEO mode here.</p> <p>25 THE COURT: And, Counsel, we're right at the</p>

<p style="text-align: right;">3777</p> <p>1 lunch -- or noon, but we can go on for a bit more.</p> <p>2 MR. BIERIG: I've got about five more minutes.</p> <p>3 THE COURT: All right.</p> <p>4 MR. BIERIG: This claim about pulling Saltzer out</p> <p>5 of the network is quite ironic, given that Saint Alphonsus's</p> <p>6 document, for example the one that Your Honor is seeing now,</p> <p>7 reveal that Saint Alphonsus has been seriously considering</p> <p>8 eliminating Saltzer from its network. But more basically,</p> <p>9 as I previously mentioned, and as the Micron natural</p> <p>10 experiment clearly demonstrates, a network doesn't need</p> <p>11 Saltzer or St. Luke's to be competitive. It may be that a</p> <p>12 network without St. Luke's providers is less attractive to</p> <p>13 some people than one with such providers, but that doesn't</p> <p>14 mean that St. Luke's has the power to foreclose competition</p> <p>15 in the market for adult primary care services, as the Micron</p> <p>16 experience clearly demonstrates.</p> <p>17 So plaintiffs' network-foreclosure theory, like its</p> <p>18 referral-foreclosure theory, is meritless. Which brings me</p> <p>19 to my final point on the private plaintiffs' foreclosure</p> <p>20 claims. While these plaintiffs assert that the Saltzer</p> <p>21 transaction has foreclosed their ability to compete, the</p> <p>22 evidence at trial reveals the exact opposite. I have</p> <p>23 already shown that 2013 has been the most profitable year</p> <p>24 ever for TVH's physician investors.</p> <p>25 Saint Alphonsus -- I love this -- Saint Alphonsus has</p>	<p style="text-align: right;">3778</p> <p>1 announced -- while it's claiming that it's being foreclosed</p> <p>2 and that it won't be able to compete effectively, Saint</p> <p>3 Alphonsus has recently announced that it is investing</p> <p>4 33-and-a-half-million dollars -- this can be up on the</p> <p>5 screen. Can we open the screen, Your Honor?</p> <p>6 THE COURT: Yes.</p> <p>7 MR. BIERIG: This competitor that claims that its</p> <p>8 ability to compete is being suppressed has recently</p> <p>9 announced that it is investing 33-and-a-half-million dollars</p> <p>10 to improve its hospital in Nampa. These are not the actions</p> <p>11 of entities whose ability to compete has been crippled;</p> <p>12 instead, they are vigorous competitive responses to the</p> <p>13 competition that the Saltzer transaction is injecting into</p> <p>14 the market.</p> <p>15 In sum, Your Honor, the situation is precisely what I</p> <p>16 said in my opening statement. Saint Alphonsus and TVH are</p> <p>17 exceedingly concerned about the competition that they are</p> <p>18 facing as a result of the affiliation of Saltzer with</p> <p>19 St. Luke's and the likely subsequent construction of a</p> <p>20 St. Luke's hospital in Canyon County.</p> <p>21 Let's look at what Saint Alphonsus said -- we may have</p> <p>22 to go AEO on this -- let's look at what Saint Alphonsus said</p> <p>23 in a capital submission document to its parent corporation,</p> <p>24 Trinity, in late 2011. Your Honor can see this on slide 45.</p> <p>25 Many of plaintiffs' responses to the competition that</p>
<p style="text-align: right;">3779</p> <p>1 is being injected by the Saltzer transaction, like the</p> <p>2 investment in Saint Alphonsus Nampa by the Saint Alphonsus</p> <p>3 system or the opening of Treasure Valley Hospital's new</p> <p>4 surgery center in Nampa, are very legitimate responses to</p> <p>5 competition, but this lawsuit designed to kill the Saltzer</p> <p>6 transaction before its procompetitive effects can be</p> <p>7 realized is not.</p> <p>8 Plaintiffs have offered this court absolutely no</p> <p>9 evidence to support a conclusion that the likely effect of</p> <p>10 the transaction will be an anticompetitive increase in price</p> <p>11 or a foreclosure of the ability of the hospital plaintiffs</p> <p>12 to compete. None whatsoever. It is their case that is</p> <p>13 built entirely on speculation and on the notion of "trust</p> <p>14 me."</p> <p>15 Having addressed the highly speculative and unproven</p> <p>16 nature of plaintiffs' claims of likely anticompetitive</p> <p>17 benefits, I want to move to the procompetitive effects of</p> <p>18 the Saltzer transaction, but I think the best time to do</p> <p>19 that would be after lunch, Your Honor.</p> <p>20 THE COURT: All right. Counsel, let's take, then,</p> <p>21 a -- let's try to reconvene roughly at 1:30. We'll take</p> <p>22 roughly an hour and a half. All right. We'll be in recess</p> <p>23 until 1:30 this afternoon.</p> <p>24 (Recess.)</p> <p>25 THE COURT: Mr. Bierig. You may resume your</p>	<p style="text-align: right;">3780</p> <p>1 argument.</p> <p>2 MR. BIERIG: Good afternoon, Your Honor.</p> <p>3 Turning to procompetitive effects of the Saltzer</p> <p>4 transaction, there are at least four such effects:</p> <p>5 One: Substantially enhanced community outreach as part</p> <p>6 of a program of population health management to reduce the</p> <p>7 need for hospitalization and for acute care.</p> <p>8 Two: Provision of care for all patients, including</p> <p>9 Medicaid and uninsured patients, regardless of their ability</p> <p>10 to pay.</p> <p>11 Third: Delivery of fully integrated care using the</p> <p>12 best available electronic health record, evidence-based</p> <p>13 medicine protocols that are developed and implemented by</p> <p>14 physicians, and information on provider performance and</p> <p>15 patient outcomes that come only from an integrated system</p> <p>16 using very sophisticated measurement tools, such as</p> <p>17 WhiteCloud data analytics.</p> <p>18 And fourth: Transitioning from the fee-for-service</p> <p>19 system that pays providers based on the volume of procedures</p> <p>20 to an alternative in which providers are rewarded for</p> <p>21 providing high-value care and avoiding unnecessary</p> <p>22 procedures.</p> <p>23 During my opening statement, Your Honor asked whether</p> <p>24 these four effects are real or whether they are pie in the</p> <p>25 sky. I would respectfully submit that the evidence has</p>

<p style="text-align: right;">3781</p> <p>1 shown that they are anything but pie in the sky.</p> <p>2 Numerous physicians, including, for example,</p> <p>3 Dr. Tom Patterson, have testified that their affiliation</p> <p>4 with St. Luke's has enabled them to start or significantly</p> <p>5 to expand community outreach programs designed to keep</p> <p>6 people well, the better health pillar of the Triple Aim.</p> <p>7 Likewise, numerous Saltzer physicians, for example,</p> <p>8 Dr. Harold Kunz, have testified that Saltzer's affiliation</p> <p>9 with St. Luke's has enabled Saltzer physicians to stop</p> <p>10 limiting the number of Medicaid and uninsured patients that</p> <p>11 they see and to accept all patients without regard to their</p> <p>12 financial or insurance status.</p> <p>13 The evidence has also shown the enormous investment</p> <p>14 that St. Luke's has made and is making in the Epic EHR and</p> <p>15 in the WhiteCloud data analytics tool. These tools and the</p> <p>16 information they provide have already had a huge impact on</p> <p>17 physician practices, as Dr. Brian Fortuin testified when he</p> <p>18 demonstrated WhiteCloud to this court.</p> <p>19 They have also enabled St. Luke's to align incentives</p> <p>20 by transitioning its physicians to our quality-based</p> <p>21 compensation, and they have permitted St. Luke's to identify</p> <p>22 and reach out to patients who will benefit from additional</p> <p>23 outreach or more intensive services.</p> <p>24 These efforts have already begun to bear fruit in the</p> <p>25 form of programs, such as CoPar, which seeks to reduce costs</p>	<p style="text-align: right;">3782</p> <p>1 and improve quality of care and quality of life for some of</p> <p>2 the sickest patients.</p> <p>3 Additionally, numerous physicians who previously worked</p> <p>4 in independent practices have testified that access to</p> <p>5 St. Luke's state-of-the-art health information technology</p> <p>6 and a compensation based on the fixed payment structure have</p> <p>7 fundamentally improved their ability to care for patients.</p> <p>8 Thus, for example, Dr. Marshall Priest testified that</p> <p>9 he and his colleagues at Idaho Cardiology Associates were</p> <p>10 able to establish a congestive heart failure clinic, which</p> <p>11 significantly improved the quality of care for cardiac</p> <p>12 patients, only after their practice affiliated with</p> <p>13 St. Luke's.</p> <p>14 Similarly, Dr. James Souza testified that Idaho</p> <p>15 Pulmonary Associates was able to implement an EICU,</p> <p>16 establish revenue-reducing protocols for sleep studies, and</p> <p>17 developed a lung nodule clinic only through its affiliation</p> <p>18 with St. Luke's.</p> <p>19 But St. Luke's efforts will fully blossom in 2015, not</p> <p>20 in 2020, as plaintiffs suggest, when having gone further</p> <p>21 down the road to full clinical integration, St. Luke's,</p> <p>22 through its strategic partner, SelectHealth, will be able to</p> <p>23 offer full-risk contracts to commercial payors.</p> <p>24 If this were pie in the sky, St. Luke's would be very</p> <p>25 foolish to have invested the tens of millions of dollars</p>
<p style="text-align: right;">3783</p> <p>1 that it has in Epic and WhiteCloud. It would be very</p> <p>2 foolish to create programs like CoPar, whose purpose is to</p> <p>3 reduce the use of hospitals and other high costs and, in a</p> <p>4 fee-for-service world, high-revenue services.</p> <p>5 In short, if this were pie in the sky, St. Luke's would</p> <p>6 not have taken these and the other steps it has taken and is</p> <p>7 taking to make value-based delivery of healthcare a reality.</p> <p>8 There are two further pieces of evidence that</p> <p>9 demonstrate that these procompetitive effects are anything</p> <p>10 but pie in the sky. One comes from defendants, and one</p> <p>11 comes from plaintiffs.</p> <p>12 First, defendants' expert, Professor Alain Enthoven,</p> <p>13 has testified how numerous integrated delivery systems, such</p> <p>14 as Kaiser and Geisinger Clinic, have already succeeded in</p> <p>15 achieving improved costs and quality measures by taking the</p> <p>16 same steps that St. Luke's is now taking to provide</p> <p>17 integrated care.</p> <p>18 As Professor Enthoven has explained, working with</p> <p>19 employed physicians rather than with loosely affiliated</p> <p>20 physicians has made the transition quicker and more</p> <p>21 effective for those systems. Indeed, Professor Enthoven</p> <p>22 testified that Geisinger has specifically noted that its</p> <p>23 employed physicians are faster and more effective in</p> <p>24 adopting innovations than independent physicians are.</p> <p>25 On the plaintiffs' side, Richard Armstrong, director of</p>	<p style="text-align: right;">3784</p> <p>1 the Idaho Department of Health and Welfare, has testified</p> <p>2 that the four procompetitive effects that St. Luke's is</p> <p>3 trying to achieve are precisely the goals that the</p> <p>4 Department is seeking to achieve.</p> <p>5 The Department's commitment to these goals demonstrates</p> <p>6 that they are anything but speculative. Indeed, the</p> <p>7 testimony of Director Armstrong sounded remarkably similar</p> <p>8 to the testimony of Dr. Pate regarding the need for clinical</p> <p>9 integration and a transition to value-based delivery of</p> <p>10 care.</p> <p>11 Now, plaintiffs seek to counter St. Luke's</p> <p>12 procompetitive effects with three somewhat related</p> <p>13 arguments. They say that these efficiencies are not merger</p> <p>14 specific, have not been quantified, and are speculative in</p> <p>15 that they have not yet been fully realized. None of these</p> <p>16 criticisms has the slightest validity.</p> <p>17 First, each and every one of the asserted</p> <p>18 procompetitive benefits is merger specific. The Saltzer</p> <p>19 transaction enables St. Luke's to offer community outreach</p> <p>20 programs in Canyon County. Absent the transaction, the</p> <p>21 economic constraints on the Saltzer physicians prevented</p> <p>22 them from seeing all Medicaid and uninsured patients.</p> <p>23 The testimony of Dr. John Kaiser and other Saltzer</p> <p>24 physicians could not have been clearer that, without the</p> <p>25 affiliation with St. Luke's, Saltzer would simply not have</p>

<p style="text-align: right;">3785</p> <p>1 gotten access to the Epic EHR, could not and would not have 2 made the investment needed to have access to WhiteCloud, 3 would not have put in place a payment structure that enables 4 them to develop evidence-based practice protocols to better 5 serve the patients of Canyon County, and would, therefore, 6 simply not have been able to move toward delivery of fully 7 integrated care. 8 Perhaps most importantly, the evidence has shown that 9 the affiliation with Saltzer has given St. Luke's the 10 presence in Canyon County and the scale and type of 11 financial arrangements with physicians that it needs in 12 order to move to risk-based delivery of care. 13 So I want at this point, Your Honor, to answer the very 14 first question that the court posed at the beginning of the 15 discussion today. The Saltzer transaction is necessary to 16 achieve a risk-based integrated healthcare delivery system 17 in Canyon County on anywhere near the timeline that 18 St. Luke's and Saltzer are on. 19 Saltzer simply did not have the resources or the 20 infrastructure to create a system that could manage and bear 21 downside risk. You heard testimony on that. And St. Luke's 22 didn't have the presence in Canyon County needed to provide 23 a product such as this one. Without the Saltzer affiliation 24 with its seven Mercy physicians, it would have taken years 25 for St. Luke's to develop the size and the scale needed to</p>	<p style="text-align: right;">3786</p> <p>1 do this successfully. 2 So the answer to the question that the court posed is 3 emphatically yes. And that point leads me to explain the 4 eighth reason that plaintiffs' reliance on market shares and 5 HHI calculations rather than on actual competitive 6 conditions is particularly misguided in this case. 7 Plaintiffs simply fail to recognize that in order to 8 have a fully integrated delivery system that will take both 9 upside and downside financial risks, the system must be of a 10 size and scale that enables it to offer a full range of 11 services across a population sufficiently large that the 12 system can spread the costs of unduly expensive outliers 13 across a large number of patients. 14 That issue was raised most directly in this case in the 15 court's question to Professor Enthoven: Does the ability to 16 offer an integrated delivery system that bears financial 17 risk require that system to have a substantial number of the 18 physicians in a market? 19 In a small or midsize market, the answer to that 20 question is definitely yes. That is the lesson of such 21 systems as Kaiser, Geisinger, and Intermountain. 22 Your Honor has already pointed out that Kaiser has 40 23 percent of the market in all of California. And that is one 24 of the lessons of Judge Posner's decision in <i>Marshfield</i> 25 <i>Clinic</i> nearly 20 years ago, where the Seventh Circuit</p>
<p style="text-align: right;">3787</p> <p>1 refused to break up the Marshfield Clinic even though that 2 clinic employed all of the physicians in Marshfield and in 3 several neighboring counties. 4 Notably, that was before the Marshfield Clinic and 5 other integrated delivery systems moved, as they are moving 6 now, to value-based delivery of care. Today, two decades 7 later, the financial incentives offered in the 8 Accountable Care Organization and Medicare Shared Savings 9 Program provision of the Affordable Care Act demonstrate 10 that the Congress of the United States has recognized the 11 value of integrated risk-bearing systems such as the one 12 that St. Luke's is building. 13 In large metropolitan areas, like Los Angeles or 14 Chicago, there are so many physicians that there can be many 15 competing integrated delivery systems. But in a midsize 16 market, like the Treasure Valley, the need for scale is such 17 that it is unlikely that there will be more than two 18 integrated delivery systems of sufficient size to manage 19 risk. 20 Saint Alphonsus's own documents recognize this fact. 21 Here is how Saint Alphonsus put it, quote: "A majority of 22 physicians see alignment and integration occurring around 23 Saint Alphonsus's and St. Luke's health systems throughout 24 the region, with a few cross-over physicians." 25 And that is why it is neither surprising nor</p>	<p style="text-align: right;">3788</p> <p>1 anticompetitive that St. Luke's would have a larger 2 percentage of primary care physicians in Canyon County than 3 the merger guidelines, which are, after all, only guidelines 4 which set forth as possibly posing anticompetitive concerns. 5 Plaintiffs' second criticism is that defendants have 6 not been able to quantify each benefit of the transaction. 7 In plaintiffs' words, defendants bear a, quote, "heavy 8 burden," end quote, to, quote, "verify the magnitude of each 9 asserted efficiency," end of quote. 10 Once again, plaintiffs are just plain wrong. Thus, in 11 the <i>Staples</i> case, the court rejected the FTC's position that 12 evidence of benefits must be, quote, "clear and convincing." 13 The <i>Staples</i> court recognized -- and this is very important 14 for purposes of this case -- quote, "a difference between 15 efficiencies which are merely speculative and those which 16 are based on a prediction backed by sound judgment." That's 17 the words of the <i>Staples</i> court. 18 That's exactly what we have here. We have efficiencies 19 that are based on predictions of benefits that are based on 20 sound business judgment, backed by sound business judgment. 21 That's what we have here. 22 In <i>Baker Hughes</i>, the D.C. Circuit ruled that a 23 defendant cannot be required to produce evidence of 24 procompetitive effects with a, quote, "degree of 25 clairvoyance alien to Section 7, which...deals with</p>

<p style="text-align: right;">3789</p> <p>1 probabilities, not certainties," end of quote.</p> <p>2 Here we have shown that the asserted benefits are very</p> <p>3 probable. They may not be certain, but the Section 7</p> <p>4 doesn't require certainty; it requires probability. And</p> <p>5 that's what we have shown.</p> <p>6 And in the <i>Tenet Healthcare</i> case, the Eighth Circuit</p> <p>7 ruled that evidence that a transaction will lead to</p> <p>8 integrated delivery of healthcare and ultimately better</p> <p>9 healthcare will rebut a prima facie case. The Eighth</p> <p>10 Circuit did not impose any quantification requirement at</p> <p>11 all.</p> <p>12 It went on to make a statement that is very relevant --</p> <p>13 and that really foreshadows the comment Your Honor made this</p> <p>14 morning -- when it said, "In view of the significant changes</p> <p>15 in healthcare delivery, a merger, deemed anticompetitive</p> <p>16 today, could be considered procompetitive tomorrow."</p> <p>17 In view of <i>Marshfield Clinic</i> and <i>Tenet Healthcare</i>, I</p> <p>18 just do not see how plaintiffs can say with a straight face</p> <p>19 that the benefits of the Saltzer transaction -- community</p> <p>20 health outreach to try to keep people well, care for all</p> <p>21 patients regardless of ability to pay, full clinical</p> <p>22 integration to achieve the second pillar of the Triple Aim,</p> <p>23 better care, and a transition to value-based care -- are</p> <p>24 irrelevant to the antitrust analysis; yet, that is what I</p> <p>25 thought I heard today.</p>	<p style="text-align: right;">3790</p> <p>1 Plaintiffs' third attack is the most misguided of all.</p> <p>2 The law does not require that all the benefits of a</p> <p>3 transaction as complex as this one be proven at the outset</p> <p>4 of the transaction. If that were the case, no vertical</p> <p>5 integration could ever pass muster because it takes time</p> <p>6 both to realize the benefits and then to measure them.</p> <p>7 That's exactly what Director Armstrong said when he set that</p> <p>8 2017 date. Rather, it is enough that the benefits are</p> <p>9 likely.</p> <p>10 And that is why the Ninth Circuit in the <i>Miller</i> case</p> <p>11 cautioned against undoing a healthcare merger where doing so</p> <p>12 might detract from the quality of care for patients and</p> <p>13 would mean that, quote, "innovative procedures made possible</p> <p>14 by the transaction would have to be abandoned," end quote.</p> <p>15 The defendants readily acknowledge that the movement to</p> <p>16 value-based delivery of care is a work in progress. It will</p> <p>17 take time. That is why the fact so heavily relied upon by</p> <p>18 the plaintiffs that the Saltzer physicians are compensated</p> <p>19 in part on the basis of RVUs is entirely irrelevant.</p> <p>20 The testimony stands unrefuted that St. Luke's has</p> <p>21 already moved to quality-based compensation for</p> <p>22 cardiologists, pulmonologists, and internists, and that it</p> <p>23 will be transitioning the Saltzer physicians to a</p> <p>24 compensation approach in which 20 percent of their pay is</p> <p>25 based on quality measures.</p>
<p style="text-align: right;">3791</p> <p>1 Both sides to the transaction recognize that</p> <p>2 development of the proper quality measures is an iterative</p> <p>3 process in which the physicians must play an important role,</p> <p>4 and that neither party had enough experience or enough data</p> <p>5 to know how to set the appropriate quality measures at the</p> <p>6 time of the transaction. And both St. Luke's and Saltzer</p> <p>7 are still, after all, operating in a fee-for-service</p> <p>8 environment.</p> <p>9 So, of course, the process is ongoing, but that doesn't</p> <p>10 make it any less competitive -- any less procompetitive.</p> <p>11 At trial, as I just mentioned, Director Armstrong of</p> <p>12 the Department of Health and Welfare gave important</p> <p>13 testimony, very relevant testimony on this issue. He</p> <p>14 explained why the Department's plans just to implement</p> <p>15 evidence-based clinical preventive services would take until</p> <p>16 2017.</p> <p>17 And both Dr. Enthoven and Pat Richards of SelectHealth</p> <p>18 testified about all the actions that a delivery system must</p> <p>19 take in order to be able to transition to full value-based</p> <p>20 care and risk-based contract.</p> <p>21 Surely, neither the Clayton Act nor the Idaho antitrust</p> <p>22 statute requires that all the benefits of a transaction be</p> <p>23 fully realized and measured at the time of the challenge.</p> <p>24 And that brings me to the third and perhaps the most</p> <p>25 cynical of the Catch-22 scenarios that plaintiffs would</p>	<p style="text-align: right;">3792</p> <p>1 impose upon St. Luke's. Specifically, on one hand, the</p> <p>2 private plaintiffs succeeded in securing a commitment at the</p> <p>3 preliminary-injunction hearing that St. Luke's would not</p> <p>4 integrate Saltzer into the Epic EHR and would not take other</p> <p>5 integrative steps that would make divestiture impossible.</p> <p>6 Then, a year later, they argue the transaction is unlawful</p> <p>7 because its benefits have not fully materialized and have</p> <p>8 not been measured.</p> <p>9 As I have said before, Joseph Heller would be extremely</p> <p>10 proud of these plaintiffs.</p> <p>11 Plaintiffs resort to another tactic. They try to rely</p> <p>12 on facts that are not in evidence. What they do is they ask</p> <p>13 a witness a question as to whether the witness has heard</p> <p>14 "X." And then when the witness says, "No, I hadn't heard</p> <p>15 that," they then sort of, in their findings of fact, say</p> <p>16 that "X" is a fact when, in fact, it isn't.</p> <p>17 And Your Honor had indicated that if that occurs, the</p> <p>18 court will not rely on that kind of testimony, and we urge</p> <p>19 that the court adhere to that statement.</p> <p>20 In any event, the basic point here is that the</p> <p>21 procompetitive benefits of the Saltzer transaction are</p> <p>22 anything but speculative. They are not certain, but they</p> <p>23 are, in the words of the <i>Staples</i> court, a prediction backed</p> <p>24 by sound business judgment and by the models, such as Kaiser</p> <p>25 and Geisinger and others, which have indicated that they</p>

<p style="text-align: right;">3793</p> <p>1 very much work.</p> <p>2 Some of the benefits are farther along than others, but</p> <p>3 they are far more likely to occur than the anticompetitive</p> <p>4 price increases or vertical foreclosure of competition about</p> <p>5 which plaintiffs have done nothing but speculate.</p> <p>6 And this brings me to plaintiffs' final argument, that</p> <p>7 the procompetitive benefits of the Saltzer transaction could</p> <p>8 have been realized with a much looser affiliation.</p> <p>9 The first point to note here is that this is, again, a</p> <p>10 very ironic argument coming from Saint Alphonsus inasmuch as</p> <p>11 Saint Alphonsus made an offer to employ the Saltzer</p> <p>12 physicians in 2012 and, as this slide indicates, offered</p> <p>13 much the same procompetitive reasons that St. Luke's is</p> <p>14 offering for the need for employment.</p> <p>15 Your Honor can read it. "Certainly, a more formal</p> <p>16 alignment would accelerate these possibilities and</p> <p>17 facilitate development of a solid integrated model..." This</p> <p>18 was said at a time when Saltzer was already in the Alliance.</p> <p>19 The critical difference is that Saint Alphonsus's offer</p> <p>20 included an onerous 90-mile covenant not to compete and, if</p> <p>21 accepted, would have resulted in physician concentration</p> <p>22 numbers in Canyon County far greater than those associated</p> <p>23 with the St. Luke's affiliation.</p> <p>24 But the larger point here is that plaintiffs have not</p> <p>25 shown and cannot show that Saltzer and St. Luke's could</p>	<p style="text-align: right;">3794</p> <p>1 achieve these benefits as quickly or as efficiently by other</p> <p>2 means.</p> <p>3 THE COURT: Well, Counsel, I have been wrestling</p> <p>4 in my mind kind of the issue of who has that burden. If I</p> <p>5 follow the kind of the classic model of requiring the</p> <p>6 plaintiffs to establish the anticompetitive effect of the</p> <p>7 merger, shifting the burden to the defense to establish that</p> <p>8 the procompetitive effects -- or that, overall, the</p> <p>9 transaction still has a procompetitive effect, if you're</p> <p>10 relying upon, you know, the vertical integration or the</p> <p>11 integration of -- I guess, clinical and financial</p> <p>12 integration as a means of promoting risk-based contracting</p> <p>13 and the other benefits, isn't that burden upon you to</p> <p>14 establish that, in fact, not only that there will be</p> <p>15 benefits, but that the benefits cannot be obtained without</p> <p>16 this type of a close, not only clinical but financial</p> <p>17 integration envisioned by the acquisition?</p> <p>18 MR. BIERIG: That's a very good question, and</p> <p>19 that's one we have been wrestling with ourselves,</p> <p>20 Your Honor. That's not how I see it.</p> <p>21 I think their burden is to prove that there are</p> <p>22 significant anticompetitive effects, which, as I've said, I</p> <p>23 don't think they have done other than showing the HHI</p> <p>24 numbers.</p> <p>25 Then the burden shifts to us to show that what we are</p>
<p style="text-align: right;">3795</p> <p>1 doing is -- that the procompetitive effects of what we are</p> <p>2 doing outweigh the anticompetitive effects. If we do that,</p> <p>3 I think the burden then shifts back to them to say that</p> <p>4 those procompetitive effects could have been achieved in a</p> <p>5 different manner less restrictive of competition.</p> <p>6 That's the way I look at it, Your Honor.</p> <p>7 THE COURT: So the idea is that simply -- well,</p> <p>8 carrying the burden, I guess persuading the court, that your</p> <p>9 motivation and what is intended and what will occur would be</p> <p>10 the risk-based contracting, the use of kind of integrated</p> <p>11 clinical healthcare systems, et cetera, et cetera, that's</p> <p>12 sufficient to carry your burden, whatever it is. And that</p> <p>13 if the plaintiffs challenge that, either the necessity or,</p> <p>14 in fact, the ability of that to achieve what is intended,</p> <p>15 that's their burden.</p> <p>16 MR. BIERIG: That would be my position. I think</p> <p>17 that's done in <i>Baker Hughes</i> that says that the burden is</p> <p>18 always on the plaintiff. The burden of persuasion is always</p> <p>19 on the plaintiff.</p> <p>20 And if you look at analogous cases in the Sherman Act</p> <p>21 context, the standard way to look at the issue is: The</p> <p>22 plaintiff has to prove anticompetitive effects. Okay. If</p> <p>23 they do that, the burden shifts to the defendant to prove</p> <p>24 that the procompetitive effects that they are setting forth</p> <p>25 outweigh the anticompetitive effects.</p>	<p style="text-align: right;">3796</p> <p>1 We think we have done that. We think there are no real</p> <p>2 anticompetitive effects, but we think there are very strong</p> <p>3 procompetitive effects. Once we do that, then we think that</p> <p>4 the burden shifts back to them to prove that there is a</p> <p>5 reasonable, less restrictive alternative. But let's keep</p> <p>6 that in mind as we continue this discussion, Your Honor.</p> <p>7 THE COURT: Okay.</p> <p>8 MR. BIERIG: Because the most that the plaintiffs</p> <p>9 have done is to offer testimony from Dr. Kenneth Kizer and</p> <p>10 from Dr. Dranove to the effect that the jury is still out on</p> <p>11 whether tight affiliation is necessary to realize the</p> <p>12 benefits of fully integrated care or whether joint venture</p> <p>13 arrangements can do the job equally well.</p> <p>14 Okay. If we're right about the burden of proof, then</p> <p>15 if the jury is still out, the plaintiffs have not met their</p> <p>16 burden on this point. But, in any event, the empirical</p> <p>17 evidence at trial pointed markedly in one direction: A</p> <p>18 greater degree of physician employment is associated with</p> <p>19 improved quality-of-care results.</p> <p>20 And as Professor Enthoven testified, all the integrated</p> <p>21 delivery systems which St. Luke's is trying to emulate rely</p> <p>22 on a very large nucleus of employed physicians to develop</p> <p>23 the system's innovations and to put them in place.</p> <p>24 In fact, Kaiser has adopted what FTC counsel this</p> <p>25 morning has characterized as the, quote, "nutty," end quote,</p>

<p style="text-align: right;">3797</p> <p>1 approach of employing all its physicians. That nutty 2 approach has led them to have 40 percent of the market. I 3 wish I could be so nutty in my practices. 4 In any event, outside of this litigation, 5 Saint Alphonsus has recognized the point itself. Thus, in a 6 letter dated December 20th -- this is one we're going to 7 have to do AEO, for just Your Honor to see. Outside of this 8 litigation, Saint Alphonsus, in a letter dated December 9 20th, 2011, to a primary care group that Saint Alphonsus was 10 seeking to acquire, the director of primary care at 11 Saint Al's, Dr. Michael Roach, wrote as follows. I'll read 12 it without giving the identity of the entity. 13 Quote: "I believe" -- 14 MR. ETTINGER: I don't know that solves the AEO 15 problem if the language that's AEO is being read. 16 MR. BIERIG: Well, the language of AEO is not 17 being read -- 18 THE COURT: Counsel, I can read it on the screen. 19 MR. BIERIG: What I want to emphasize is the 20 language that what we need is -- 21 THE COURT: Well, tell me where it is. 22 MR. BIERIG: It says -- it starts out, "I believe 23 our partnership and the opportunity to" -- 24 THE COURT: Okay. That's enough. 25 MR. BIERIG: Okay. Then you can see the words</p>	<p style="text-align: right;">3798</p> <p>1 "employment" in there. 2 THE COURT: Okay. Just -- 3 MR. BIERIG: "Will strengthen all aspects of" -- 4 MR. ETTINGER: Your Honor -- 5 THE COURT: Just a moment. It's what's 6 highlighted in yellow on this screen. 7 MR. BIERIG: Yes. 8 THE COURT: Is this 58? 9 I assume, again, that the PowerPoint slides used in 10 your closing will be made part of the record, so I'm going 11 to refer to exhibit -- slide 58 of St. Luke's closing 12 argument -- I guess -- I assume they are PowerPoint 13 slides -- and that which is highlighted in yellow. So I 14 think we've got a record as to what you're referring to. I 15 can read it without having it quoted. 16 MR. BIERIG: Your Honor, when asked in this case 17 whether he could identify any physician or physician 18 practices that are deeply integrated with Saint Alphonsus 19 outside an employment context, Dr. Roach answered with a 20 one-word answer: "No." 21 Can we put that back on the screen? No. Okay. 22 Even if one assumes arguendo that full clinical 23 integration could be achieved as quickly and as effectively 24 without a tight affiliation with Saltzer physicians -- a 25 conclusion which defendants strongly dispute -- the goal of</p>
<p style="text-align: right;">3799</p> <p>1 transitioning to risk-based contracts could not be. In 2 order to do that, a system must have a firm handle on its 3 costs. 4 And as long as a system is dealing primarily with 5 independent physicians who are charging on a fee-for-service 6 basis, it is more difficult to control costs sufficiently to 7 offer value-based healthcare delivery on a per-patient, 8 per-month basis. That's not to say it can't be done; it's 9 just a lot harder. 10 In this connection, plaintiffs make the closely related 11 argument that defendants have not produced sufficient 12 studies with statistically significant results to 13 demonstrate that employment of physicians enhances the 14 transition to value-based healthcare delivery any more than 15 joint ventures do. 16 Of course, as we just discussed, this argument 17 overlooks the fact that, as the D.C. circuit noted in the 18 <i>Baker Hughes</i> case, the burden of persuasion always remained 19 on the plaintiffs, not on the defendant. 20 And it overlooks the fact that, as Professor Enthoven 21 testified, evidence from other integrated delivery systems 22 strongly suggest that employment of physicians is, in fact, 23 the best way to move to risk-based healthcare delivery. 24 In any event, a study of the magnitude called for by 25 plaintiffs would take years, if it could be done at all to</p>	<p style="text-align: right;">3800</p> <p>1 plaintiffs' satisfaction. If businesspersons waited for 2 definitive studies with statistically significant results 3 before taking actions, they would be left in the dust by 4 their more innovative competitors. 5 Plaintiffs also fail to identify any realistic 6 alternative to the Saltzer transaction that would produce 7 anything approaching integrated value-based care in 8 Canyon County on the timetable that St. Luke's and Saltzer 9 are working to achieve. 10 While plaintiffs' experts, Dr. Kizer and Dr. Dranove, 11 both vaguely pointed to Advocate in Chicago -- and we heard 12 about Advocate again today in testimony from plaintiffs' 13 counsel -- neither of those experts gave any specifics or 14 sought to explain whether anything like the purported 15 Advocate model would have any chance in the Treasure Valley. 16 No one from Advocate was called to testify in this 17 case, and so plaintiffs' counsel's self-serving 18 characterization of the Advocate model should be given no 19 weight. 20 In this connection, it is significant that John Kee and 21 others have testified that they tried over many years to 22 form clinically integrated networks without tight financial 23 and personal alignment of physicians in Southern Idaho, but 24 they failed. 25 Plaintiffs' final effort on this point was to offer the</p>

<p style="text-align: right;">3801</p> <p>1 testimony of its last witness, its chief medical officer, 2 Dr. J.R. Polk, to the effect that Dr. Polk believes 3 Saint Alphonsus can successfully achieve full clinical 4 integration using a majority of independent physicians 5 rather than employed physicians. 6 It's noteworthy that Dr. Polk, like plaintiffs' 7 experts, is in complete agreement with St. Luke's about the 8 value of integrated risk-based care. But it's even more 9 noteworthy that Saint Alphonsus's efforts to transition to 10 risk-based contracting are much less far along and much less 11 developed than St. Luke's. 12 But most fundamentally -- and this is a point I would 13 really like Your Honor to consider: Most fundamentally, the 14 antitrust laws do not require this court to place a 15 straitjacket on St. Luke's and to decree that there can be 16 only one road to full clinical integration. FTC counsel 17 stated this morning that many different approaches are being 18 taken around the country. 19 It's not yet clear which road will lead to the best 20 outcome for patients. Rather, the determination of the best 21 road is the function of the market, not of this court. If 22 Saint Alphonsus and its experts and if plaintiffs' counsel 23 are correct that these other ways work better, the market, 24 rather than judicial fiat, should be the way to sort things 25 out.</p>	<p style="text-align: right;">3802</p> <p>1 For that reason, I want to conclude my analysis of the 2 merits by again citing what I still believe to be the most 3 compelling judicial pronouncement for Your Honor to 4 consider. 5 That pronouncement was made by the Ninth Circuit 6 in -- we can put the screen on. That pronouncement was made 7 by the Ninth Circuit court, whose decisions are binding in 8 this court, in <i>United States vs. Syufy Enterprises</i>. There 9 the Court of Appeals observed that if market forces can 10 potentially cure the perceived problem, then, quote, "a 11 court ought to exercise extreme caution because judicial 12 intervention in a competitive situation can itself upset the 13 balance of market forces, bringing about the very ills the 14 antitrust laws were meant to prevent." 15 Director Armstrong of the Department of Health and 16 Welfare has testified that all of the anticipated benefits 17 of the Saltzer transaction are results that will further the 18 goals of the Department. The import of his testimony is 19 that St. Luke's should be given a chance to deliver on the 20 promise of that transaction. 21 Director Deal of the Department of Insurance has 22 testified that if a healthcare provider is moving toward a 23 system in which it is compensated based on outcome rather 24 than on fee-for-service, that provider should be given a 25 chance to do so.</p>
<p style="text-align: right;">3803</p> <p>1 Defendants urge this court to heed this wise counsel of 2 the heads of the two departments of this state who are most 3 directly involved with the issues raised by this case and to 4 follow the wise teaching of the appellate court. It should 5 not enter an order that would, in the words of the Ninth 6 Circuit, quote, "upset the balance of market forces," end 7 quote, and thereby risk, quote, "bringing about the very 8 ills the antitrust laws were meant to prevent," end of 9 quote. 10 That said, should this court somehow decide that the 11 Saltzer affiliation is unlawful, we urge the court not to 12 order divestiture. We do not take this position because 13 events since the preliminary injunction have made it 14 impossible to divest Saltzer, and we do not take this 15 position because it would be burdensome or costly for 16 St. Luke's to divest Saltzer. Rather, we take this position 17 because, on the facts of this case, divestiture would be a 18 singularly inappropriate exercise of this court's equitable 19 powers. 20 When this -- when the affiliation was announced in 21 2012, well before the preliminary-injunction hearing, seven 22 surgeons -- Saltzer's greatest revenue producers -- left 23 Saltzer and joined Saint Alphonsus. Contrary to what 24 plaintiffs' counsel says, that result was not defendant's 25 doing. It was a decision made of the surgeons, by the</p>	<p style="text-align: right;">3804</p> <p>1 surgeons, and for the surgeons. 2 Dr. Kaiser and Mr. Bill Savage have testified that 3 without these surgeons, Saltzer cannot be a viable 4 competitive force. And defendants' expert Lisa Ahern has 5 testified that if Saltzer is divested, its physicians will 6 earn only two-thirds of what they earned pretransaction. 7 Moreover, it is no answer to say, as plaintiffs have 8 glibly asserted, that Saltzer can just go out and recruit 9 new surgeons. As several witnesses from Saltzer have 10 testified, one of the principal reasons that Saltzer 11 affiliated with St. Luke's was that it could not recruit new 12 physicians as an independent clinic. 13 How much worse would its recruiting efforts be when its 14 physicians are making a significantly lower income than they 15 did before? 16 A divestiture order would seriously threaten the 17 ongoing viability of Saltzer, without whom there would be a 18 huge loss in continuity of care and harm to the community. 19 But even if the downward spiral could be overcome, the 20 effects on patients would be horrendous. 21 Divestiture would, as Dr. Kaiser has testified, 22 eliminate Saltzer's access to the infrastructure that its 23 physicians need to offer their patients the fully integrated 24 21st-century medicine that those patients deserve. It would 25 require Saltzer physicians to curtail unprofitable community</p>

<p style="text-align: right;">3805</p> <p>1 outreach services. It would force them to limit the number</p> <p>2 of Medicaid and uninsured patients that they see. And it</p> <p>3 would gut -- it would gut Saltzer's efforts to be part of</p> <p>4 the transition to value-based delivery of care.</p> <p>5 This is not a result that this court should mandate.</p> <p>6 Instead, if this -- if this court concludes that there has</p> <p>7 been a violation and that some relief is required, there is</p> <p>8 a middle ground, as Your Honor suggested.</p> <p>9 And that middle ground would be the approach that</p> <p>10 St. Luke's offered to the FTC and to the State of Idaho</p> <p>11 before this case was even filed. An order could require</p> <p>12 Saltzer to negotiate fee-for-service contracts independently</p> <p>13 of St. Luke's. Such an order, in our view, is entirely</p> <p>14 unwarranted by the facts of this case for all the reasons I</p> <p>15 have stated, but it would effectively address all the</p> <p>16 concerns about which plaintiffs have speculated.</p> <p>17 If the plaintiffs are concerned that joint negotiations</p> <p>18 of St. Luke's and Saltzer give them too much power, the</p> <p>19 remedy is to have them negotiate separately. A firm barrier</p> <p>20 could be erected such that those negotiating for Saltzer,</p> <p>21 which does remain a separate independent entity, would not</p> <p>22 know what St. Luke's was doing with respect to</p> <p>23 fee-for-service contracting and vice versa.</p> <p>24 The notion -- the notion put forward today that</p> <p>25 divestiture, the full remedy sought by plaintiffs, is a</p>	<p style="text-align: right;">3806</p> <p>1 middle ground is nothing short of nonsense. Rather, as</p> <p>2 another court in the Ninth Circuit has put it, divestiture</p> <p>3 should not be entered into without substantial evidence that</p> <p>4 the benefit outweighs the harm.</p> <p>5 Here, defendants have produced all sorts of evidence</p> <p>6 that the harm to patients and to the public from divestiture</p> <p>7 would be enormous. Plaintiffs, by contrast, have offered</p> <p>8 nothing as to the effect of divestiture on the people of</p> <p>9 Canyon County and nothing to support the proposition that</p> <p>10 divestiture is an appropriate remedy, except perhaps to</p> <p>11 punish St. Luke's and Saltzer for what plaintiffs regard as</p> <p>12 an unlawful transaction.</p> <p>13 The mere fact that it's an easy remedy doesn't make it</p> <p>14 a good remedy, and it is hardly enough -- the arguments put</p> <p>15 forth by plaintiffs are hardly reason enough to issue an</p> <p>16 order that will inevitably produce all the harms that the</p> <p>17 Saltzer physicians and defendants' expert Lisa Ahern</p> <p>18 discussed.</p> <p>19 Before concluding, Your Honor, I would like to make one</p> <p>20 final point. In my opening statement, I identified 13</p> <p>21 mistakes that plaintiffs would make in this case. Having</p> <p>22 sat through the trial, I believe that plaintiffs, in fact,</p> <p>23 made each and every one of them. But they have made a 14th</p> <p>24 mistake that may transcend all the others. An explanation</p> <p>25 of that mistake will bring the wheel full circle to the very</p>
<p style="text-align: right;">3807</p> <p>1 first day of trial.</p> <p>2 On that day the first counsel to speak for plaintiffs</p> <p>3 said this, quote: "This case is not about the Affordable</p> <p>4 Care Act. This case is not a debate about how healthcare</p> <p>5 can or should be improved. This case is also not about what</p> <p>6 someone hopes to do in improving healthcare as a result of</p> <p>7 that debate. Rather, what this case is about is the proper</p> <p>8 application of laws enacted both by Congress and the Idaho</p> <p>9 Legislature which uphold competition," end of quote.</p> <p>10 This case is, of course, about the antitrust laws of</p> <p>11 this state and of this nation. But it is also about the</p> <p>12 future of the delivery of healthcare to the people of the</p> <p>13 Treasure Valley. And because this case is being closely</p> <p>14 watched across the country, it is about the future of</p> <p>15 delivery of healthcare to people all across America.</p> <p>16 This case calls upon the court to harmonize the</p> <p>17 antitrust laws with healthcare considerations, as <i>Marshfield</i></p> <p>18 <i>Clinic</i> and <i>Tenet Healthcare</i> clearly hold.</p> <p>19 The advocated divorce of the antitrust laws from</p> <p>20 healthcare considerations lies at the very heart of the</p> <p>21 problems with plaintiffs' case. Neither the Clayton Act nor</p> <p>22 the Idaho Antitrust Act requires this court to ignore the</p> <p>23 realities of the rapidly changing healthcare market, as</p> <p>24 plaintiffs would do by their formalistic incantation of HHI</p> <p>25 numbers, by their desperate efforts to minimize the</p>	<p style="text-align: right;">3808</p> <p>1 innovation and improvements to healthcare that St. Luke's,</p> <p>2 in substantial part through the Saltzer affiliation, is</p> <p>3 bringing to Canyon County and to Southern Idaho in general,</p> <p>4 and by their refusal to acknowledge the profound, profound</p> <p>5 harm to the delivery of healthcare in Canyon County that</p> <p>6 their requested remedy would surely produce.</p> <p>7 At the end of the day, Your Honor, this case will</p> <p>8 determine whether the antitrust laws stand as an</p> <p>9 insurmountable obstacle to the provision of 21st-century</p> <p>10 medicine to people in mid-sized markets. Specifically,</p> <p>11 whether, despite all the evidence of the benefits of large,</p> <p>12 fully integrated delivery systems that are endeavoring to</p> <p>13 transition to the provision of value-based care, people in</p> <p>14 such markets will be relegated to what the Seventh Circuit</p> <p>15 has termed "horse-and-buggy medicine."</p> <p>16 Defendants respectfully submit that a ruling to that</p> <p>17 effect would stand the antitrust laws on their head. It</p> <p>18 would suppress the very innovative and procompetitive</p> <p>19 changes that St. Luke's and Saltzer have brought to the</p> <p>20 market, the precise sort of conduct that the antitrust laws</p> <p>21 properly understood as a consumer welfare prescription are</p> <p>22 intended to promote.</p> <p>23 A ruling for plaintiffs, Your Honor, would be very,</p> <p>24 very bad medicine in two senses of that phrase, and it would</p> <p>25 be very bad law as well. It would be the wrong way to fill</p>

<p style="text-align: right;">3809</p> <p>1 the antitrust prescription to advance consumer welfare in 2 this valley. The right medicine is to enter judgment for 3 defendants on all claims, and we respectfully ask this court 4 to administer that medicine. 5 Thank you, Your Honor. 6 THE COURT: Thank you. 7 Mr. Julian. 8 MR. JULIAN: May it please the court and counsel. 9 I wish to offer a few brief comments for my closing 10 argument. 11 Mr. Bierig has outlined the defense very well. Saltzer 12 Medical Group agrees and supports St. Luke's position stated 13 earlier as to plaintiffs' failure to meet its burden of 14 proof. I would simply like to take this opportunity to make 15 a few observations for the assistance of the court. 16 For Saltzer Medical Group and its patients, this case 17 has profound significance. The very livelihood of its 18 physicians, 300 support staff, the medical care of tens of 19 thousands of patients hang in the balance of this decision. 20 In my opening statement, I mentioned the government 21 when administering antitrust laws, and the court in applying 22 those laws, must do what every physician does every day of 23 his or her life. First of all, do no harm. First, do no 24 harm to the ultimate consumer. Second, do no harm to the 25 good quality of medical practice in the community. And</p>	<p style="text-align: right;">3810</p> <p>1 third, do no harm to physicians who have chosen to make 2 integration of medical services a valuable tool for properly 3 serving their patients with their chosen partner, St. Luke's 4 Health System. 5 Let me address each of those three points briefly. 6 First, do no harm to the ultimate consumer. The remedy 7 sought by plaintiffs is so extreme that the court must weigh 8 the benefit of divestiture versus the harm to the ultimate 9 consumer, the patient. 10 It must be noted that the purpose of antitrust laws is 11 to enhance consumer welfare. In this case, the plaintiffs 12 have failed to prove any potential for consumer harm. In 13 fact, there has not been one single witness -- not one 14 single patient, even -- to speak on behalf of any consumer. 15 It is only with the proposition that what commercial 16 insurance payors may perceive in the future as economically 17 undesirable will also equate to harm to the ultimate 18 consumer. 19 Prices for medical services are set by arms-length 20 negotiations with commercial payors. The evidence in this 21 case is that there are statewide contracts which, with very 22 little deviation, make the same payment to all physicians. 23 The short of the matter is neither St. Luke's nor Saltzer 24 could survive without receiving payments from commercial 25 insurers. Adding Saltzer and St. Luke's together does not</p>
<p style="text-align: right;">3811</p> <p>1 change that fact. 2 The testimony of Drs. Kaiser, Patterson, and Kunz 3 address the preaffiliation limitations on government-insured 4 and uninsured patients. With this transaction, as best 5 stated by Dr. Kaiser, the clinic is now, quote, "payor 6 blind." In other words, they take all patients regardless 7 of financial or insurance status. 8 If ultimately the mission of this lawsuit is to improve 9 consumer welfare, but the court nevertheless orders full 10 divestiture, how do we explain to the uninsured and the 11 government-insured patients that they can no longer be seen 12 by a physician of their choice and that their treatment at 13 our clinic must be limited? 14 The second question ultimately should be: Why 15 shouldn't patients in the Treasure Valley receive the same 16 medical care as available at the Mayo Clinic, the Cleveland 17 Clinic, the Kaiser Clinic system? With this affiliation, 18 St. Luke's system is well on its way to offering that same 19 standard of care. 20 All of the physicians who testified were very clear 21 that if this relationship is unwound, Saltzer physicians 22 would have to revert to the practice of screening patients 23 on ability to pay. 24 It was Dr. Patterson who indicated these individuals 25 are some of our community's most vulnerable, and they would</p>	<p style="text-align: right;">3812</p> <p>1 have a limited access to care. There was a great concern to 2 him due to the very high uninsured population in 3 Canyon County. 4 As Dr. Kunz testified, this patient population already 5 has difficulty obtaining healthcare. Bill Savage testified 6 that Saltzer is now seeing a significant increase in the 7 number of government and uninsured patients. 8 Second point: Let's talk about not doing harm to the 9 good quality of medical practice in the community. 10 Saltzer Medical Group entered into this transaction for 11 St. Luke's for the right reason: to improve medical care. 12 As stated by Dr. Kunz, the practice of medicine has changed 13 in the last 10 or 12 years. And while Saltzer had good 14 tools, they simply weren't good enough. 15 He addressed that, through negotiations and prior 16 interactions with St. Luke's, Saltzer physicians felt 17 valued; they felt that they were listened to; they felt 18 there was a strong level of trust. 19 In the relationship, the physicians' right to refer 20 patients to any physician and admit to any hospital, 21 specifically Saint Al's Nampa, was absolutely critical. In 22 fact, Dr. Patterson testified that it was a deal-breaker if 23 they weren't given that right. 24 Testimony from the Saltzer physicians has given the 25 court ample evidence as to the reasons they sought out and</p>

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1 chose to enter into the relationship with St. Luke's Health
2 System. None of those reasons had anything to do with
3 market leverage, increasing fees to patients or commercial
4 payors.

5 All physicians testified that Saltzer could not
6 implement risk-based contracting due to its limited size,
7 limited number of specialists, and the inability to address
8 the risk without financial reserves. Dr. Patterson added
9 that, due to technology limitations, Saltzer was not even
10 able to measure outcomes necessary to set up this type of
11 system.

12 Finally, Dr. Patterson's testimony bottom-lined the
13 entire issue: A value-based model really cannot be done in
14 private practice. Dr. Kaiser indicated that, due to
15 financial limitations and the limited number of physicians,
16 Saltzer could not have had access to Epic or WhiteCloud or
17 any other state-of-the-art electronic medical record system.

18 Dr. Kunz addressed his desire to have a robust medical
19 records and health information technology system for his
20 patients. He did not consider Saltzer's to be adequate in
21 today's medical practice, and he expressed concern that
22 Saltzer didn't have the money or the resources to buy the
23 kind of IT that they needed.

24 Dr. Patterson referred to the current system as a
25 plug-and-play system which did not have the extended ability

1 to look at outcomes, did not have patient registry options.
2 Dr. Kunz provided this court specific testimony of how
3 his access to WhiteCloud analytic tool positively impacted
4 his patients and changed the way he approached his practice
5 of medicine.

6 Remember also the testimony of Mr. Savage and former
7 CFO Nancy Powell that the Epic medical records system would
8 not even consider negotiating with Saltzer because they are
9 simply too small.

10 All the physicians and Mr. Savage testified to
11 recruitment problems for Saltzer associated with not being
12 part of an integrated system. Without this affiliation,
13 Saltzer would face huge obstacles and recruitment of new
14 physicians who all wish to be part of an integrated system
15 and for which Saltzer cannot compete in regards to
16 compensation.

17 Dr. Kaiser testified that treatment of non-
18 English-language patients had been improved through a
19 formalized St. Luke's certified translator program. He also
20 addressed how St. Luke's --

21 THE COURT: Just a minute. Whoever is listening
22 in needs to put their phone on mute. We're getting a lot of
23 feedback. If you could either hang up or put your phone on
24 mute.

25 Let's go ahead and try to proceed. If that isn't

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1 resolved, we will just have to insist that they not listen
2 in since it's interrupting the court and counsel.

3 MR. JULIAN: I appreciate that. I was afraid that
4 was the court reminding me my red light was on.

5 THE COURT: No, no. I'm resisting a temptation to
6 ask a number of questions here, Mr. Julian, because it
7 strikes me that you're -- and I think you're doing a great
8 job of pointing that out, that there is a different
9 perspective that your client has even from St. Luke's.
10 Because the concern I had at the outset -- that is, is this
11 merger, this type of full, I guess, employment of the
12 physicians, full financial integration necessary to
13 accomplish the overall objectives? My sense is it probably
14 is more important to you; in other words, more critical to
15 your being able to obtain that than it is even for
16 St. Luke's.

17 But then you raised the comment in terms of, I guess, a
18 procompetitive or a prosocial effect, the fact that the
19 Saltzer Medical Group physicians would no longer have to be
20 concerned about the source of payment; they would simply
21 take on whoever comes in the door, comes in the door.

22 But then I have to wonder -- and I can understand
23 that's the economics. I mean, either there is no payment or
24 limited payment provided. And in order to make sure that
25 the compensation for the physicians and everything remains

1 basically what the expectation would be for the community,
2 those -- you would have to be careful about the either
3 no-pays or the limited-pay patients.

4 Then how does that change when St. Luke's gets
5 involved? And I tried to envision -- you can say: Well,
6 they can spread that risk around through a lot more
7 physicians. But at the bottom line they have the same -- as
8 a not-for-profit, they still have to break even.

9 And so that means, presumably, that that cost of the
10 uninsured or the limited compensation, the Tricare or the
11 Medicaid patients and whatnot, that that presumably would be
12 picked up by the consumer through increased prices
13 negotiated with -- I'm just not sure where that gets us,
14 because ultimately --

15 MR. JULIAN: Well, and I don't know if I can
16 answer it from a pure accounting standpoint. I can tell you
17 that a clinic that used to have 50 doctors that now has 40,
18 that had its seven top producers taken by Saint Al's and is
19 still paying for the overhead would have to look at only
20 commercial payors. They could not look at others.

21 Now, we're comparing a clinic of 40 with 300 employees
22 compared to the resources of an organization with 10,000
23 employees who is able to, maybe even through its own
24 charity, give service and give treatment to the uninsured
25 and to the payment. And I don't see any nexus or any real

<p style="text-align: right;">3817</p> <p>1 statistical evidence that that will lead to an increase in 2 prices. 3 THE COURT: Okay. Now, kind of a related point. 4 I think the plaintiffs in their joint brief suggested that 5 there was a not-insignificant increase in the compensation 6 which the doctors would receive as a result of the 7 acquisition. In other words, their compensation, not the 8 total purchase price -- which I think had to do with maybe 9 intangibles, hard assets, and whatnot -- but the actual 10 compensation rate that was guaranteed, as I recall, for 11 three years would actually have been an increase in their 12 compensation rate. Now, I could be wrong about that 13 or -- or perhaps the plaintiffs were wrong. 14 I'm assuming the explanation is that the compensation 15 would be brought up to a par with the other primary care 16 physicians throughout the St. Luke's network, and that's 17 what occurred. It was not an increase that went beyond just 18 the average compensation rate for primary care physicians 19 throughout the St. Luke's system. Is that accurate? 20 MR. JULIAN: I think that's absolutely correct, is 21 that, by law, by federal law and other laws, that they are 22 limited to fair market value. And there were all kinds of 23 studies done. And some of the doctors at Saltzer were 24 actually below the mean. Some were brought up, some weren't 25 brought up as much. They have the potential to make more,</p>	<p style="text-align: right;">3818</p> <p>1 but it is certainly limited to fair market value as far as 2 their compensation. 3 THE COURT: Okay. And that isn't necessarily 4 apropos to your argument except it does perhaps at least 5 provide a footnote to my question, which is a suggestion 6 that the doctors at Saltzer were being overcompensated 7 because they were refusing Tricare, Medicaid patients. That 8 would -- I would indicate that's not the case because they 9 were actually, prior to the acquisition, being compensated 10 at less than what other physicians in the Treasure Valley 11 were receiving with -- 12 MR. JULIAN: Yeah. There is no evidence of that. 13 In fact, it's like any moderate-sized business. They have 14 expenses and income, and there was an obligation to increase 15 certain amounts of income by other doctors. And by taking 16 the government-insured patients, it was impossible to 17 actually make the levels they needed to keep the business 18 going. 19 I want to go through some of this. We were talking 20 about Dr. Kaiser. He was also able to deal with 21 hearing-impaired patients. He never had that opportunity at 22 Saltzer. He, in fact, had treated two deaf obstetrics 23 patients through the entire course of their pregnancy. 24 Dr. Kaiser testified that technology and data analytics 25 expertise available through St. Luke's is nothing that</p>
<p style="text-align: right;">3819</p> <p>1 Saltzer could ever match on its own. 2 Dr. Kaiser and Dr. Kunz addressed Saltzer patients and 3 said that they now have access to diabetes education and 4 management tools which could not have been provided by 5 Saltzer. 6 Dr. Kaiser testified that Saltzer's patients now have 7 access to the St. Luke's Charity Care program, providing a 8 new avenue for patient assistance. 9 But through Dr. Patterson's testimony, his passion for 10 the practice of medicine was quite evident. This is a 11 physician who has made child advocacy part of his life 12 mission. 13 You'll recall how excited he was that under this 14 affiliation, he is not only able to but he is encouraged to 15 further this life mission. He detailed his participation in 16 the Patient Centered Home Medical collaborative and how 17 Saltzer was too small and economically not in a position to 18 pilot a program. St. Luke's already had an ongoing pilot. 19 He addressed his community outreach and educational 20 programs and his participation in Kids Congress. His 21 testimony is that he can now expand his participation and 22 further his goal of improving the health of Idaho's 23 pediatric population. 24 Due to this affiliation, he is no longer worried about 25 his service volume, which is so critical in a fee-for-</p>	<p style="text-align: right;">3820</p> <p>1 service model. 2 Lastly, let's talk about harm to physicians who have 3 chosen to make integration their chosen tool. As testified 4 by Drs. Kaiser, Page, and Kunz, the physicians at Saltzer 5 made a decision that an independent, standalone, 6 fee-for-service model was not the appropriate model in 7 today's healthcare. 8 Integrated healthcare systems, and especially those 9 that emphasize value-based billing, have become the desire 10 of the practicing physician. Dr. Kaiser, Dr. Patterson, 11 Dr. Kunz all testified that, should divestiture occur, the 12 practice will change and may well not even survive. 13 Dr. Patterson, Dr. Kunz have both personally stated 14 they would strongly consider leaving Saltzer. A change in 15 this relationship, and most certainly the requested entire 16 divestiture, would result in significant economic harm to 17 Saltzer, its physicians, employees. 18 As testified by Dr. Kaiser, Saltzer cannot and will not 19 be in a position to invest in anything; in fact, will be 20 cutting costs, not increasing overhead. In such a climate, 21 the quality of medical care will suffer. 22 Dr. Kunz referenced his concerns of divestiture as lack 23 of accounts receivable, enormous overhead burden, inability 24 to recruit, and the obligation to pay competitive wages -- 25 all of which will result in an unhealthy struggling medical</p>

<p style="text-align: right;">3821</p> <p>1 practice.</p> <p>2 As testified by Dr. Patterson, "We will be fighting so</p> <p>3 hard to survive, we're not going to be able to compete."</p> <p>4 And that is a very insightful statement, and that's why this</p> <p>5 is relevant, what their financial status is. They are not</p> <p>6 as strong at the end of 2012 as they had been before.</p> <p>7 It is telling that both the Idaho Department of Health</p> <p>8 and Welfare and the Idaho Department of Insurance were</p> <p>9 brought by the defendants to testify in favor of the goals</p> <p>10 of this affiliation. The plaintiffs in this suit went so</p> <p>11 far as to attempt to impeach the Idaho executive branch when</p> <p>12 such officials testified that the affiliation was in the</p> <p>13 best interests of the healthcare of Idaho residents and was</p> <p>14 consistent with the Idaho Department of Health and Welfare's</p> <p>15 vision for future medical care.</p> <p>16 The goals of Saltzer in entering into the St. Luke's</p> <p>17 relationship were the very same goals testified by the</p> <p>18 director of Department of Health and Welfare and the</p> <p>19 director of the Department of Insurance. Those include</p> <p>20 value-based billing over fee-for-service billing, expansion</p> <p>21 and encouragement of electronic medical records system,</p> <p>22 integrated healthcare, medical care access to all regardless</p> <p>23 of ability to pay, serving the significant Medicaid</p> <p>24 population in Canyon County.</p> <p>25 If the court's concern is of maintaining competition,</p>	<p style="text-align: right;">3822</p> <p>1 then we cannot ignore the fact that Saltzer Medical Group,</p> <p>2 in December 2012 and the few months following, lost 25</p> <p>3 percent of its physicians. It is simply not the same group.</p> <p>4 It is going to have difficulty competing. And we will not</p> <p>5 be able to provide the type of medical care that's -- that's</p> <p>6 due these tens of thousands of patients.</p> <p>7 If Saltzer is forced to go out of business due to</p> <p>8 divestiture, who benefits? Certainly not the tens of</p> <p>9 thousands of patients who have used Saltzer for over 50</p> <p>10 years for primary care. In fact, it would appear the only</p> <p>11 benefiting party would be the competing hospital who</p> <p>12 desperately wants to unwind a deal, a deal it once attempted</p> <p>13 to transact on its own behalf.</p> <p>14 Based on the foregoing, Your Honor, Saltzer Medical</p> <p>15 Group submits that plaintiffs' claims must be denied.</p> <p>16 Thank you.</p> <p>17 THE COURT: Thank you, Mr. Julian.</p> <p>18 Let me -- before, I guess -- I guess I don't have an</p> <p>19 order. I might address Mr. Wilson. I'm going to guess that</p> <p>20 you had some concerns with some of Mr. Julian's last</p> <p>21 comments in terms of a clean-hands and failing-firm defense.</p> <p>22 I noted that. And as I noted earlier, I'm not going to</p> <p>23 regard that evidence except within the context that I</p> <p>24 indicated I would. And I'm not faulting Mr. Julian. He is</p> <p>25 making a pitch, but we certainly were talking about things</p>
<p style="text-align: right;">3823</p> <p>1 that sounded a lot like unclean-hands and the failing-firm</p> <p>2 defense.</p> <p>3 Now, I don't have an order, but I think there is some</p> <p>4 amount of time left. Plus, I know the defendants went over,</p> <p>5 and I'll give you the same time.</p> <p>6 MR. ETTINGER: Your Honor, could we possibly</p> <p>7 impose on the court and get a five-minute break before so we</p> <p>8 can sort this out?</p> <p>9 THE COURT: I think that would be a very good</p> <p>10 idea. Let's make it a ten-minute recess. This will be our</p> <p>11 second and last recess of -- not only of the day but I guess</p> <p>12 of the trial. We'll be in recess.</p> <p>13 (Recess.)</p> <p>14 THE COURT: Mr. Wilson.</p> <p>15 MR. WILSON: Thank you, Your Honor.</p> <p>16 Before I begin, Your Honor, the plaintiffs wanted to</p> <p>17 propose to the court that each side submit a proposed order</p> <p>18 following today's hearing. There is some nuance to, for</p> <p>19 example, what the plaintiffs are suggesting with notice and</p> <p>20 things like that that the court might benefit from having a</p> <p>21 proposed order.</p> <p>22 THE COURT: I have no -- have you discussed that</p> <p>23 with counsel and there's an agreement?</p> <p>24 MR. WILSON: No.</p> <p>25 THE COURT: Mr. Bierig?</p>	<p style="text-align: right;">3824</p> <p>1 MR. BIERIG: Well, our proposed order will be very</p> <p>2 simple: Judgment is entered for defendants. So I'll</p> <p>3 propose it right now. We have really no order to propose</p> <p>4 other than that.</p> <p>5 If the court decides to impose an order, we would</p> <p>6 certainly be pleased to comment on it before it's made</p> <p>7 final. But, you know, going through this exercise, our</p> <p>8 order is going to be, you know, judgment for defendants.</p> <p>9 THE COURT: Mr. Wilson.</p> <p>10 MR. WILSON: Fair enough.</p> <p>11 THE COURT: Let me dig in as we work through a</p> <p>12 decision. And if we feel the need for some further</p> <p>13 briefing -- and there is every possibility we may as we see</p> <p>14 issues that we're still trying to tease things out. It's a</p> <p>15 very complicated matter. And as I indicated earlier, this</p> <p>16 is an unusual case. I rarely, if ever, reach this point in</p> <p>17 a case without a pretty clear direction in my mind where I</p> <p>18 think I need to come out. This case defies that.</p> <p>19 I think the writing is going to be where I'll finally</p> <p>20 figure out where -- at least I hope I'll finally figure</p> <p>21 out -- where I think it has to come down. But it's just a</p> <p>22 very difficult issue.</p> <p>23 MR. WILSON: I'm sure that will change in the next</p> <p>24 48 minutes, Your Honor.</p> <p>25 May I proceed?</p>

<p style="text-align: right;">3825</p> <p>1 THE COURT: Yes, you may.</p> <p>2 MR. WILSON: Your Honor, on the question of</p> <p>3 remedy, the case law is clear that when a violation is</p> <p>4 found, all doubts on remedy are resolved in the favor of the</p> <p>5 government. And the law is that divestiture is the most</p> <p>6 suitable remedy in a suit for relief from a Section 7</p> <p>7 violation, and that divestiture should always be in the</p> <p>8 forefront of a court's mind when a violation of Section 7</p> <p>9 has been found.</p> <p>10 Now, in Mr. Bierig's presentation, he quoted some</p> <p>11 language from a district court opinion out of the Central</p> <p>12 District of California, the <i>Gabaret</i> case.</p> <p>13 That language, Your Honor, as the court reviews it is</p> <p>14 latent dicta. It's not supported in any citation to</p> <p>15 authority, nor could it be because it's not the law.</p> <p>16 Curiously, the defendants fail to quote this language</p> <p>17 from the <i>Gabaret</i> case that immediately follows the language</p> <p>18 they have quoted, and it quotes language from Professor</p> <p>19 Areeda's treatise that, "Of course, none of these concerns</p> <p>20 about divestiture is dispositive in a suit by a government</p> <p>21 plaintiff."</p> <p>22 <i>Gabaret</i> was a case involving purely a private</p> <p>23 plaintiff, and that's obviously not what you have before</p> <p>24 you.</p> <p>25 The case law makes clear that divestiture is the law of</p>	<p style="text-align: right;">3826</p> <p>1 the land, it's the law of this circuit, and there is nothing</p> <p>2 extraordinary about the court ordering it here.</p> <p>3 With regard to the remedy that the defendants have</p> <p>4 proposed, Your Honor, they don't mention it in their</p> <p>5 argument today, but it's clear that the remedy they are</p> <p>6 proposing comes from the <i>Evanston</i> case a few years ago, a</p> <p>7 case that was -- an opinion that was rendered by the Federal</p> <p>8 Trade Commission. This case is not the <i>Evanston</i> case.</p> <p>9 In the <i>Evanston</i> case, the FTC went to great pains in</p> <p>10 its opinion to say that the remedy that it chose there was</p> <p>11 not ideal and imposed only because the circumstances in that</p> <p>12 case presented what it regarded as highly unusual</p> <p>13 circumstances. And there were two reasons that made that</p> <p>14 case unusual.</p> <p>15 First, in <i>Evanston</i>, one of the principal reasons the</p> <p>16 FTC did not want to unwind the transaction there was because</p> <p>17 the parties had already achieved a couple of concrete</p> <p>18 benefits as a result of the transaction. For example,</p> <p>19 Highland Park Hospital had a cardiac surgery program that</p> <p>20 the court didn't want to have go away as a result of a</p> <p>21 divestiture.</p> <p>22 Here, in contrast, there is zero evidence that the</p> <p>23 parties have achieved any concrete benefit as a result of</p> <p>24 the transaction. As Mr. Bierig points out, that's not</p> <p>25 necessarily the defendants' fault -- because, after all,</p>
<p style="text-align: right;">3827</p> <p>1 they have promised they wouldn't integrate -- but it is a</p> <p>2 reason why divestiture is an appropriate remedy here.</p> <p>3 Secondly, and the principal reason that the FTC chose</p> <p>4 the remedy that it did in <i>Evanston</i>, was that the parties had</p> <p>5 been merged together in that case and fully integrated for</p> <p>6 seven years in what the FTC described as a complex, lengthy,</p> <p>7 and expensive process. Essentially, as a practical matter,</p> <p>8 the eggs couldn't be unscrambled. Here, of course, the eggs</p> <p>9 have not been scrambled.</p> <p>10 In fact, in a promise the defendants made to this court</p> <p>11 and to the government plaintiffs, that they wouldn't argue</p> <p>12 that you couldn't unscramble the egg, they essentially</p> <p>13 promised that the <i>Evanston</i> remedy would not apply.</p> <p>14 And there is a nuance here that the court has probably</p> <p>15 picked up on. The defendants found themselves, I'm sure, in</p> <p>16 a little bit of a trick bag. Because they wanted to propose</p> <p>17 a remedy other than divestiture, they looked to the <i>Evanston</i></p> <p>18 case, which proposed these two separate negotiating teams.</p> <p>19 And they said: Well, how can we propose the <i>Evanston</i> remedy</p> <p>20 of separate negotiating teams when the whole reason we're</p> <p>21 telling the court that we want to do this deal is because</p> <p>22 Saltzer needs St. Luke's to negotiate risk-based</p> <p>23 contracting?</p> <p>24 The ingenious solution they came up with was that their</p> <p>25 remedy only applies to fee-for-service contracts. But the</p>	<p style="text-align: right;">3828</p> <p>1 whole premise of their defense is that the entire system is</p> <p>2 moving to risk-based contracting and that they don't want to</p> <p>3 do fee-for-service contracting anymore.</p> <p>4 So if the court is to believe them, that the reason to</p> <p>5 do this deal is because everything is moving to risk-based</p> <p>6 contracting, according to Mr. Bierig today, by 2015, the</p> <p>7 remedy they propose is really no solution at all. Because</p> <p>8 very soon, according to their own argument, it won't apply.</p> <p>9 It's really just -- just a remarkable argument they</p> <p>10 make. I'm tempted to say Joseph Heller came up with it,</p> <p>11 but --</p> <p>12 And, of course, as I mentioned in our initial argument,</p> <p>13 a remedy like that, Judge, would require a significant</p> <p>14 amount of oversight and monitoring to be effective.</p> <p>15 But, really, the most important point is the remedy</p> <p>16 that the court imposes has to cure the anticompetitive harm</p> <p>17 caused by the transaction, and the one that they have</p> <p>18 proposed doesn't.</p> <p>19 Think about it this way: You have got one negotiating</p> <p>20 team from St. Luke's, one negotiating team from Saltzer.</p> <p>21 Who do they report to? It's the same company. They are</p> <p>22 still taking the orders from the same bosses. And, in fact,</p> <p>23 in the <i>Evanston</i> case, a group of economists filed an amicus</p> <p>24 brief ridiculing this solution as not really providing any</p> <p>25 solution at all.</p>

<p style="text-align: right;">3829</p> <p>1 Think about it. If one of the two negotiating teams</p> <p>2 acts anticompetitively, the business is just shifted over to</p> <p>3 the other negotiating team. Either way, we both win. Well,</p> <p>4 what both of them will be thinking when they are on either</p> <p>5 side of the wall that the defendants propose the court</p> <p>6 should erect. It all goes with the same bottom line, so</p> <p>7 there is really no incentive in a situation like this to</p> <p>8 vigorously compete with each other. It's just a really,</p> <p>9 really bad idea.</p> <p>10 Can we skip to the next slide.</p> <p>11 We can black that out, please.</p> <p>12 THE COURT: You want the -- is this AEO?</p> <p>13 MR. WILSON: No. It's just an argument I'm not</p> <p>14 ready to make yet.</p> <p>15 THE COURT: Oh.</p> <p>16 MR. WILSON: With regard to Saltzer's financial</p> <p>17 condition, Your Honor, it's notable that there was testimony</p> <p>18 from several witnesses that Saltzer has no contingency plan</p> <p>19 whatsoever if the court orders a divestiture. There has</p> <p>20 been no discussion, no plan, no plan to have a plan.</p> <p>21 These are very smart people, Your Honor. Why do they</p> <p>22 have no contingency plan? Is it because they forgot to do</p> <p>23 one, or is it because they think they will be just fine if</p> <p>24 divestiture is ordered?</p> <p>25 Before the acquisition, Saltzer was a thriving,</p>	<p style="text-align: right;">3830</p> <p>1 profitable business and turned a profit every year over the</p> <p>2 past three decades at least.</p> <p>3 And why does Saltzer think it will be just fine? When</p> <p>4 this deal closed, Your Honor, Saltzer got a \$9 million New</p> <p>5 Year's Day gift from St. Luke's. Almost 8 million of that</p> <p>6 went directly into the pockets of the Saltzer doctors.</p> <p>7 And so, in a sense, even if the court were to credit</p> <p>8 some of this evidence about the financial condition of</p> <p>9 Saltzer, in a sense, the parties have already negotiated for</p> <p>10 you what an effective remedy would be. It's in their</p> <p>11 agreements.</p> <p>12 There is a provision in the PSA, Section 6.9 and 6.10,</p> <p>13 about what happens if a court orders the transaction</p> <p>14 unwound. And it says Saltzer gets to keep that money. The</p> <p>15 parties signed that agreement on Christmas Eve, long after</p> <p>16 the lawsuit had been filed, when the government was</p> <p>17 breathing down their necks, threatening an antitrust</p> <p>18 challenge, after the preliminary-injunction hearing when</p> <p>19 Your Honor told the parties that you would have no problem</p> <p>20 ordering an unwinding if you found a violation.</p> <p>21 So, in a sense, the parties have basically already</p> <p>22 bargained for what they think they need to stay afloat. And</p> <p>23 if Saltzer doesn't think that's enough, it's free to tell</p> <p>24 the court otherwise.</p> <p>25 Let's go now to the evidence they did present about</p>
<p style="text-align: right;">3831</p> <p>1 Saltzer's financial condition, and that was chiefly through</p> <p>2 the testimony of their expert Lisa Ahern.</p> <p>3 What was her testimony? I think it's just as important</p> <p>4 to look at what she did not testify about. She did not</p> <p>5 testify that Saltzer will go under. She did not testify</p> <p>6 that Saltzer will not be profitable. She did not testify</p> <p>7 that Saltzer won't practice in Nampa. She didn't testify</p> <p>8 that Saltzer doctors will have to leave Nampa. She didn't</p> <p>9 testify that Saltzer doctors will not be able to increase</p> <p>10 their compensation over time. She, importantly, did not</p> <p>11 testify that Saltzer wouldn't be able to compete.</p> <p>12 All she really said -- really, her only conclusion with</p> <p>13 regard to Saltzer's financial condition was that Saltzer</p> <p>14 doctors will make less money next year. That's the extent</p> <p>15 of it. That is all the defendants rely on to try to</p> <p>16 persuade this court not to adopt the most suitable,</p> <p>17 ordinary, and effective remedy in a Section 7 case,</p> <p>18 divestiture.</p> <p>19 Even if the court did give some credit to that</p> <p>20 testimony, that's really beside the point. Because what</p> <p>21 this really is is a so-called weak company argument. That's</p> <p>22 never been adopted by any court. It's been characterized as</p> <p>23 probably the weakest ground of all to justify a merger.</p> <p>24 In fact, a case from this circuit said that that</p> <p>25 defense should be rejected because it would expand the</p>	<p style="text-align: right;">3832</p> <p>1 failing company defense, a defense which has strict limits.</p> <p>2 I heard you again, Your Honor. I'm tempted to go</p> <p>3 there; I will not go there, but --</p> <p>4 THE COURT: I sensed you were --</p> <p>5 MR. WILSON: I think it bears repeating that the</p> <p>6 whole reason they promised they wouldn't make the argument</p> <p>7 is because we wanted to file a summary judgment motion that</p> <p>8 would have prevented all this evidence in the first place.</p> <p>9 THE COURT: Well, I'm not sure it would have</p> <p>10 prevented the evidence. If this were a jury trial, it would</p> <p>11 be a different matter. But I trust myself to be able to</p> <p>12 compartmentalize and not allow it to affect -- if it finds</p> <p>13 its way into my decision, you can file whatever you want to</p> <p>14 with the court saying, "I told you so," but I can almost</p> <p>15 promise you that it won't. Nor will it affect my decision</p> <p>16 in any way.</p> <p>17 So go ahead.</p> <p>18 MR. WILSON: Understood.</p> <p>19 There is good reason, Your Honor, why the antitrust law</p> <p>20 does not recognize a weak company defense. This is a good</p> <p>21 quote from a case from the Seventh Circuit. It basically</p> <p>22 says that this is the whole reason antitrust law is around.</p> <p>23 Because, really, loss of competition involves the</p> <p>24 acquisition of the small and the weak by the big and the</p> <p>25 strong.</p>

<p style="text-align: right;">3833</p> <p>1 I mean, we think this evidence of Saltzer's financial 2 condition is speculative and, frankly, exaggerated. But 3 even if you give the evidence some credit, as I said at the 4 outset, a weakened Saltzer is way better than the remedy 5 that they have proposed. 6 And I just want to mention while I'm up here, 7 Your Honor, that -- and I feel comfortable saying this as 8 outside counsel for the Idaho Attorney General -- Mr. Bierig 9 said that this was a quest for a litigation victory. I 10 couldn't disagree with him more on behalf of my client. 11 The Idaho Attorney General's Office saw evidence that 12 the law was being violated, and so it really believed that a 13 lawsuit was the right thing to do. Frankly, the Attorney 14 General should be commended for his fortitude in bringing 15 this case despite the very real and substantial cost of 16 doing that. 17 If he prevails, St. Luke's and Saltzer, not the 18 taxpayers of Idaho, should now bear that burden. And that's 19 why we would request the court grant leave to the Attorney 20 General and the private plaintiffs to file motions setting 21 forth their costs and attorneys fees. 22 Lastly, Your Honor, I wanted to address one point that 23 Mr. Bierig made with regard to the <i>Butterworth</i> case and the 24 effect that a board might have on checking anticompetitive 25 behavior. I think it's worth pointing out -- we have cited</p>	<p style="text-align: right;">3834</p> <p>1 to cases at paragraph 1024 of our conclusions of law -- that 2 that case, the <i>Butterworth</i> case, has been roundly rejected 3 by other courts. 4 And more importantly, with respect to the record here, 5 Mr. Bierig's point was that market fact No. 7 was that the 6 board is committed to keeping prices down. 7 You heard the evidence, Your Honor. You heard 8 Mr. Oppenheimer's testimony. Apparently, the board never 9 talks about pricing, ever. And, in fact, he testified that, 10 quote, he "could not think of one discussion on pricing at 11 the board or any committee level, anything I can remember 12 being involved in, that had to do with pricing." 13 That is a curious way to provide a check on pricing. 14 It certainly did not help in the Magic Valley. 15 And with that, I would turn the remainder of the 16 argument over to my colleagues. 17 THE COURT: Thank you, Mr. Wilson. 18 Mr. Greene. 19 MR. GREENE: Thank you, Your Honor. 20 I'm going to try and provide some counterpoise to my 21 colleague Mr. Bierig's commentary. 22 Firstly, he indicated that there were no decisions in 23 the cases that we had cited that involved physician groups. 24 That's actually not correct. The <i>OSF</i> decision, which is 25 listed on slide 29 -- which is our series of bulleted case</p>
<p style="text-align: right;">3835</p> <p>1 decisions -- actually did involve a horizontal transaction 2 involving a physician group and a hospital group. And it 3 was resolved, however, on the basis of the hospital-versus- 4 hospital portion of the transaction. But this is a very 5 recent decision that we would certainly commend to the 6 court's attention, but it did also involve a physician 7 practice group. 8 Mr. Bierig also cited to one of my four bosses, 9 Commissioner Wright. Commissioner Wright was part of the 10 unanimous vote of the Federal Trade Commission to file this 11 case and prosecute it vigorously. Commissioner Wright is an 12 economist. He really does not like the presumption. He is 13 not shy about that. 14 But even in the slide that Mr. Bierig showed, 15 Mr. Wright made it clear that it will require a change of 16 law -- a change of law in order to eliminate that 17 presumption and that calculus or structure of 18 decision-making which the court is about to embark upon. 19 THE COURT: I was going to at the time ask if 20 there is any objection to my having the full text of his 21 remarks. I assume that was made in a public setting or it 22 was otherwise reported. 23 MR. GREENE: I assume that it was. Certainly if 24 it's available, we will certainly supply it, Your Honor. 25 THE COURT: Mr. Bierig, any objection to that?</p>	<p style="text-align: right;">3836</p> <p>1 MR. BIERIG: We gave the URL site on our slide. 2 THE COURT: I noted that, but I didn't want to 3 review it unless I had counsel's concurrence that that was 4 appropriate. 5 MR. BIERIG: I think we're all in agreement that 6 it would be fine for the court -- 7 MR. GREENE: Yeah. 8 THE COURT: Thank you. I think what I will do is 9 reduce that to a hard copy to make it part of the record 10 because of -- what's that phenomena? -- link rot or 11 something like that. 12 MR. BIERIG: I think I have a hard copy. 13 THE COURT: Either way would be fine. 14 MR. GREENE: I must advise Your Honor that, of 15 course, the Commissioner is -- 16 THE COURT: He is only one person. 17 MR. GREENE: -- one of four. And we have quite 18 yeasty debates at the Commission. That's why the unanimous 19 vote was so important, because it swept the complete 20 etiological and economic spectrum of the Commission, with 21 Commissioner Wright being at one edge of that and others 22 being at the other side of it. But they all voted that this 23 was an appropriate case to proceed using current authority. 24 It would be error to require and impose upon the 25 plaintiffs a burden of showing effects. That is actually a</p>

<p>3837</p> <p>1 form of changing the law; the incipency standard by itself</p> <p>2 is at war with the idea that you would have to show effects.</p> <p>3 Because the whole idea of this is it's a forward-looking</p> <p>4 enterprise; you are trying to sort out potential effects in</p> <p>5 the future.</p> <p>6 That said, we believe there is significant evidence of</p> <p>7 actual effects based on some of the historic activities of</p> <p>8 St. Luke's. And let me turn to that portion of our slide</p> <p>9 deck which we did not have the opportunity to run through</p> <p>10 earlier.</p> <p>11 The quick overview of this is that defendants'</p> <p>12 ordinary-course documents predict that the acquisition will</p> <p>13 enhance St. Luke's and Saltzer's negotiating leverage. This</p> <p>14 may be somewhat contrary to that wonderful dog picture we</p> <p>15 saw, but it is the case that the ordinary-course documents</p> <p>16 do suggest quite strongly that leverage was certainly</p> <p>17 understood to be part of this transaction.</p> <p>18 It's also the case that increased bargaining leverage</p> <p>19 can raise reimbursements for any of the negotiated services.</p> <p>20 Recall, if you will, Your Honor, Professor Dranove's</p> <p>21 right-hand cell. It can occur in the sale of ancillary</p> <p>22 services, it could be in the changes in physician fees, but</p> <p>23 it can be anywhere in the system.</p> <p>24 The employer testimony -- and I'll be citing to some</p> <p>25 very specifically -- illustrates how the acquisition will</p>	<p>3838</p> <p>1 increase healthcare costs. And finally, the diversion</p> <p>2 analysis that was done by Dr. Dranove reinforces the</p> <p>3 evidence of likely --</p> <p>4 THE COURT: Could I ask you -- if you go back to</p> <p>5 that slide, the third bullet --</p> <p>6 MR. GREENE: Sure.</p> <p>7 THE COURT: -- the idea that it will increase</p> <p>8 healthcare costs. Now, increasing healthcare costs, in and</p> <p>9 of itself, is not a competitive concern. It's</p> <p>10 supracompetitive pricing that would be of concern.</p> <p>11 And this kind of goes back to the discussion I think I</p> <p>12 had with probably Mr. Julian about the reality of our</p> <p>13 healthcare system; that in order to be able to provide</p> <p>14 services to those who are either uninsured or</p> <p>15 underinsured -- because we assume that at the end of the</p> <p>16 day, again, the bottom right-hand cell is going to have to</p> <p>17 balance out -- that that means that somewhere along the</p> <p>18 line, there is some subsidization, if you will, to support</p> <p>19 those uninsured or underinsured.</p> <p>20 Now, the Affordable Care Act may take care of that or</p> <p>21 it may not; we don't know. I mean, obviously, the jury is</p> <p>22 still out if it ever gets implemented, which is of real</p> <p>23 concern.</p> <p>24 But I'm -- for example, if -- assuming that St. Luke's</p> <p>25 were to go forward with this and Saint Al's were to proceed</p>
<p>3839</p> <p>1 likewise and we end up with this kind of bifurcated, two</p> <p>2 primary healthcare mega entities providing the bulk of the</p> <p>3 healthcare in the Treasure Valley, it may be that healthcare</p> <p>4 costs will go up because it may be that those healthcare</p> <p>5 costs are going to be borne by Blue Cross of Idaho and</p> <p>6 others in somewhat increased rates because of the need to</p> <p>7 somehow account for people who are otherwise uninsured or</p> <p>8 underinsured.</p> <p>9 Now, of course, if the Affordable Care Act works out</p> <p>10 the way it's supposed to and everybody is insured, that</p> <p>11 won't be as much of an issue.</p> <p>12 But, just so we're clear, increasing healthcare costs</p> <p>13 by itself would not be a reason to find an anticompetitive</p> <p>14 effect unless it is a supracompetitive price. Do you agree?</p> <p>15 MR. GREENE: I think that's correct, Your Honor.</p> <p>16 I mean, the idea here, the elemental idea, is that</p> <p>17 prices which are the expression of increased market power --</p> <p>18 which is what this whole activity has been about -- are, in</p> <p>19 essence, supracompetitive. But what is the result?</p> <p>20 It is if the price happened to be because the cost of</p> <p>21 aluminum went up and aluminum foil prices go up, that's</p> <p>22 presumably neutral. If, however, it's a consequence of a</p> <p>23 merger of the two largest aluminum companies in America,</p> <p>24 that's a whole different kettle of fish.</p> <p>25 THE COURT: If healthcare costs go up because of a</p>	<p>3840</p> <p>1 kind of a restructuring of, I guess, the marketplace in</p> <p>2 healthcare, not -- that presumably would not be a reason to</p> <p>3 find this to be anticompetitive. But if it goes up, if the</p> <p>4 prices were to increase because someone has obtained a kind</p> <p>5 of a monopoly or a quasi-monopolistic position in the</p> <p>6 market, that would be the --</p> <p>7 MR. GREENE: Yes. And I think Your Honor adverted</p> <p>8 to couple other ideas here, one of which sort of freaks us</p> <p>9 out. But let me just mention the idea that you harked to,</p> <p>10 which is the idea that, at the end of the day, they might</p> <p>11 conceivably be allowed to do this transaction and others on</p> <p>12 the assumption that on a forward-looking basis, there would</p> <p>13 be two very large systems in Idaho, and that would be the</p> <p>14 reason --</p> <p>15 THE COURT: I understand -- I am just observing</p> <p>16 what seems to be happening in the marketplace, and it does</p> <p>17 seem to me that we are on a path where, you know, it may or</p> <p>18 may not be inevitable, but it certainly is looking that way;</p> <p>19 that there is a concentration I'm seeing in Eastern Idaho</p> <p>20 and various communities where consolidation seems to be the</p> <p>21 trend for a whole host of reasons, many of which we heard</p> <p>22 during this trial.</p> <p>23 Anyway, go ahead.</p> <p>24 MR. GREENE: I was going to suggest, Your Honor,</p> <p>25 not to be geeky about this, but conceptually what that's</p>

<p style="text-align: right;">3841</p> <p>1 referred to is a "duopoly." So you essentially have a</p> <p>2 shared monopoly situation. And in that -- sort of the</p> <p>3 neoclassical price theory of that is that that would drive</p> <p>4 up prices, reduce innovation.</p> <p>5 I mean, it's a classic form of restrictive competition</p> <p>6 which has unfortunate aspects all the way around and would,</p> <p>7 of course, affect pricing of risk-based contracts and the</p> <p>8 willingness of St. Luke's and others to take what we think</p> <p>9 of as the right approach.</p> <p>10 There is, however, you know, an alternate future here,</p> <p>11 which is a future of much more yeasty competition in which</p> <p>12 Saltzer could play a very big part. I mean, one of the</p> <p>13 things that Dr. Kizer talked about, as did Dr. Dranove, is</p> <p>14 this notion that smaller groups certainly could be</p> <p>15 themselves created as accountable care organizations.</p> <p>16 Saltzer has, of course, indicated it is unwilling to do</p> <p>17 that, at least in its current configuration, but it turns</p> <p>18 out that a number of the ACOs that have been certified by</p> <p>19 the Centers for Medicare and Medicaid Services are the same</p> <p>20 size or smaller than Saltzer.</p> <p>21 So, conceivably, we could have a world in which</p> <p>22 doctor-based as opposed to hospital-based competitors become</p> <p>23 the most powerful and most useful competitors in the market.</p> <p>24 And one of the things that I think we are about is to</p> <p>25 create the possibility of that series of alternate futures</p>	<p style="text-align: right;">3842</p> <p>1 in which we don't merger -- merge to monopoly or to duopoly,</p> <p>2 but we provide an opportunity for yeasty competition and all</p> <p>3 of the advantages that competition yields.</p> <p>4 Briefly, Your Honor, while we're on this point about</p> <p>5 duopoly and all that other stuff. It is the case, and I</p> <p>6 wanted to just briefly tag up on your question that started</p> <p>7 today, which was on Kaiser Permanente.</p> <p>8 One of the most interesting aspects -- I'm a Kaiser</p> <p>9 member. I do like them. But one of the aspects of Kaiser</p> <p>10 which is completely different from St. Luke's is that Kaiser</p> <p>11 has largely built its growth on internal growth. It's not</p> <p>12 the case that they have gone off willy-nilly to buy out</p> <p>13 practices all across California or all across the service</p> <p>14 areas that they provide services to. They have basically</p> <p>15 started small. They have demonstrated their capacity to</p> <p>16 reduce costs and improve quality. They are a proven, proven</p> <p>17 standard of care.</p> <p>18 And that did not come from the buy-up-the-market</p> <p>19 strategy which we think this represents. Kaiser is a</p> <p>20 completely different animal in that regard. It's also very</p> <p>21 different -- and I think -- I'm not sure how to parse this</p> <p>22 in terms of Idaho versus California, but I do know that</p> <p>23 Kaiser is a signal example of a health maintenance</p> <p>24 organization which depends upon limiting choice in order to</p> <p>25 decrease quality. I mean, that's really the -- it's</p>
<p style="text-align: right;">3843</p> <p>1 an HMO --</p> <p>2 THE COURT: Decrease quality or cost?</p> <p>3 MR. GREENE: Well, they improve both quality and</p> <p>4 cost, but what they do -- how they do that is to reduce your</p> <p>5 choice as a patient. So if you become a Kaiser member --</p> <p>6 THE COURT: You said it "depends upon limiting</p> <p>7 choice in order to decrease quality."</p> <p>8 MR. GREENE: No. You decrease choice in order to</p> <p>9 be able to demand a lower cost from your suppliers. And</p> <p>10 that -- at least until very recently, Kaiser's costs have</p> <p>11 actually started to rise now that they have 40 percent share</p> <p>12 of the market, candidly. But that model has proven to be</p> <p>13 very limited geographically. That has worked in California</p> <p>14 where HMO models are actually very popular.</p> <p>15 If there were another poll of the debate, a place that</p> <p>16 has shown almost no interest in HMO modeling, it's the state</p> <p>17 of Idaho. So whether or not this kind of Kaiser notion</p> <p>18 could be transported to this state I think is dramatically</p> <p>19 an open question. And everything we know is contrary to the</p> <p>20 notion that this model easily could be transported to this</p> <p>21 particular state.</p> <p>22 THE COURT: So the answer to that earlier question</p> <p>23 I asked is that the Federal Trade Commission did not get</p> <p>24 involved in Kaiser Permanente's growth?</p> <p>25 MR. GREENE: We didn't have to.</p>	<p style="text-align: right;">3844</p> <p>1 THE COURT: Because it was happening naturally --</p> <p>2 MR. GREENE: Neither did our colleagues at the</p> <p>3 Department of Justice. Neither did --</p> <p>4 THE COURT: I was thinking rather than California</p> <p>5 versus Idaho, it was the Yankees versus the Cardinals; free</p> <p>6 agent acquisition or --</p> <p>7 MR. GREENE: Right, right. Or the farm team.</p> <p>8 THE COURT: Or the farm team, yeah.</p> <p>9 MR. GREENE: Let me move on very briefly,</p> <p>10 Your Honor, because my time is short. The internal</p> <p>11 documents, again, this is a dog that does seem to bark.</p> <p>12 This is a document from St. Luke's. St. Luke's Treasure</p> <p>13 Valley recognizes that market share in primary care is a key</p> <p>14 success factor critical to sustaining a strong position</p> <p>15 relative to payor contracting.</p> <p>16 They very well know that what they're doing in Nampa is</p> <p>17 something that they expect to yield the kind of clout that</p> <p>18 Dr. Dranove spoke to I think so articulately.</p> <p>19 Saltzer, itself, their outside contractor Mr. Reiboldt</p> <p>20 basically said that -- I should darken this slide, as a</p> <p>21 matter of fact, Your Honor. If you would darken it. I'll</p> <p>22 switch -- that there are opportunities for improved prices</p> <p>23 in managed care negotiations. I mean, it's very clear that</p> <p>24 that side understood it.</p> <p>25 Saltzer also, through its physician Randell Page, the</p>

<p style="text-align: right;">3845</p> <p>1 head of the contracting committee, the clout of the entire</p> <p>2 network will be made available to us. This is not a small</p> <p>3 thing. That's a critical aspect of this transaction. It's</p> <p>4 understood. The dog is barking, perhaps inside his box, but</p> <p>5 he is certainly speaking on important issues, contrary to my</p> <p>6 colleague's suggestion.</p> <p>7 I think that this is perhaps one of the most important</p> <p>8 slides that we can show you and just to remind you the story</p> <p>9 of a large self-insured employer in the -- in the state of</p> <p>10 Idaho. They have been cited over and over and over again as</p> <p>11 somehow some sort of model for what's possible and how</p> <p>12 market power can be -- can be sidestepped.</p> <p>13 The problem here is that the person in charge of this</p> <p>14 says this is a game-changing -- game-changing sort of</p> <p>15 transaction. My colleague Mr. Bierig also suggested that</p> <p>16 the price differences between being in network and out of</p> <p>17 network were a couple of bucks. That is simply untrue.</p> <p>18 We know from the testimony and cited on this slide are</p> <p>19 the portions of the findings of fact which go to that</p> <p>20 question. There are huge differences, 50 to over 100</p> <p>21 percent differences, between in network and out of network.</p> <p>22 This is nothing like the 5 percent SSNIP test that we have</p> <p>23 been talking about. This is an enormous difference in</p> <p>24 price.</p> <p>25 And the fact that there has been a shift from some</p>	<p style="text-align: right;">3846</p> <p>1 providers to other providers is not to be surprising given</p> <p>2 these enormous and dramatic shifts.</p> <p>3 So we think this is -- this is not a -- this is not an</p> <p>4 example of a thing that will avoid the problem. We think</p> <p>5 this particular employer is an example of the kind of</p> <p>6 targets -- targeting done by St. Luke's.</p> <p>7 Amongst other things, this court has heard, Your Honor,</p> <p>8 that when the supplier of healthcare services to this</p> <p>9 particular employer wanted to expand, they were cut off in</p> <p>10 the terms of as soon as St. Luke's would buy a practice, it</p> <p>11 would pull it out of the network that supplied this</p> <p>12 particular employer over and over and over again. This is</p> <p>13 an example of market power and market abuse in action, and</p> <p>14 we would commend it to Your Honor.</p> <p>15 Let me turn very, very briefly to the Triple Aim, which</p> <p>16 is 58. I mentioned this in passing at the very beginning of</p> <p>17 my comments this morning. The testimony of Dr. Peterman I</p> <p>18 thought was quite powerful. The -- we can open this up,</p> <p>19 Your Honor. I'm so sorry.</p> <p>20 The testimony here was really quite extraordinary. I</p> <p>21 mean, all of the -- and this goes, I think, directly to some</p> <p>22 of the concerns Your Honor expressed to us earlier today,</p> <p>23 which is: What about these clinical improvements that are</p> <p>24 so important?</p> <p>25 This is a practice group, small. It's smaller than</p>
<p style="text-align: right;">3847</p> <p>1 Saltzer and dramatically smaller than St. Luke's, but this</p> <p>2 group basically monitors for care. It checks on whether you</p> <p>3 need a test. They have met the requirements for meaningful</p> <p>4 use. They get federal money in order to continue to sustain</p> <p>5 themselves in terms of providing the highest level of</p> <p>6 electronic technology to support their clinical work.</p> <p>7 Just for reference, Your Honor, the -- it's 42 CFR</p> <p>8 part 495 where the meaningful-use regulations are located.</p> <p>9 And if you were to compare those regulations with what</p> <p>10 Dr. Peterman was talking about, evidence-based medicine</p> <p>11 being embedded in the system, the ability to score, the</p> <p>12 ability to monitor -- all of that is in it, and it all</p> <p>13 complies with federal regulations.</p> <p>14 The other regulation to take into account is the</p> <p>15 patient -- the physician quality reporting system, which is</p> <p>16 42 CFR 414.90, another system that pays physicians to</p> <p>17 provide high-quality -- high-quality care through the use of</p> <p>18 the best available technology in the United States.</p> <p>19 That is the real world. This is going on today down</p> <p>20 the street. This is not something that you need to employ</p> <p>21 hundreds of physicians to do, nor is it something that</p> <p>22 requires us and the society here in Idaho to take a huge</p> <p>23 risk, this leap off the cliff of giving this firm an</p> <p>24 80 percent share in the second largest -- second largest</p> <p>25 city in the state of Idaho.</p>	<p style="text-align: right;">3848</p> <p>1 And I appear to have run out of time, Your Honor. And</p> <p>2 I apologize. Thank you.</p> <p>3 THE COURT: Thank you, Mr. Greene.</p> <p>4 Mr. Ettinger.</p> <p>5 MR. ETTINGER: Your Honor, I get the bat cleanup,</p> <p>6 and the first thing I wanted to do --</p> <p>7 THE COURT: Trying to carry out the baseball</p> <p>8 analogy here.</p> <p>9 MR. ETTINGER: I had a baseball bat case once, and</p> <p>10 the puns were just awful, Your Honor.</p> <p>11 I wanted, I think on behalf of the plaintiffs, if I</p> <p>12 could, to really thank the court. This for me has been a</p> <p>13 terrific experience, and we really appreciate how the court</p> <p>14 has conducted the case.</p> <p>15 And I wanted to say, since I am last, if the court has</p> <p>16 remaining questions, I wanted to, you know, invite them now</p> <p>17 or after I'm done with my argument, whatever the court</p> <p>18 prefers.</p> <p>19 One mundane thing. We discovered that the proposed</p> <p>20 findings of fact citations on our slides are our uncorrected</p> <p>21 findings, and we will get the court by tomorrow a set with</p> <p>22 the corrected findings. The numbers changed very slightly.</p> <p>23 So, with that, let me plunge in, Your Honor.</p> <p>24 We heard from the defendants a lot of fairly heated</p> <p>25 rhetoric about the public interest and about quality. And I</p>

<p>3849</p> <p>1 think that deserves a little bit of a reality check. And</p> <p>2 one way to get at that reality check is to look at who</p> <p>3 testified and, more importantly, who did not testify for the</p> <p>4 defendants here today.</p> <p>5 Number one -- today or in this trial. Number one, no</p> <p>6 St. Luke's managed care executives were produced to testify.</p> <p>7 I saw some of them in the audience several times, but they</p> <p>8 weren't produced to testify, and that is remarkable in an</p> <p>9 antitrust case in healthcare where managed care is critical</p> <p>10 to the case.</p> <p>11 So why didn't they think these most knowledgeable</p> <p>12 people had something to say? Apparently they had nothing</p> <p>13 good to say.</p> <p>14 Number two, despite these quality defenses, the chief</p> <p>15 quality officer of St. Luke's did not testify. The vice</p> <p>16 president for clinical integration, Dr. Swanson, did not</p> <p>17 testify. Maybe it's because he was the author of that</p> <p>18 endgame document with the "M" word in it. But, again, it's</p> <p>19 remarkable that the people who are most responsible for</p> <p>20 these issues did not testify.</p> <p>21 Finally, Your Honor, most significantly, you heard from</p> <p>22 a variety of witnesses for the plaintiffs, including, among</p> <p>23 others, payors, network -- independent network executives,</p> <p>24 employers. On behalf of the defendants, you did not hear</p> <p>25 from a single voluntary third-party witness, not a one. The</p>	<p>3850</p> <p>1 only third-party witnesses were the two government officials</p> <p>2 who were subpoenaed.</p> <p>3 So why couldn't they find a payor to support them? Why</p> <p>4 couldn't they find an employer? Why couldn't they find an</p> <p>5 independent doctor?</p> <p>6 I think when you think about the public interest here,</p> <p>7 Your Honor, it's useful to think about who is standing up</p> <p>8 and who isn't standing up in this situation. That says a</p> <p>9 lot about the benefit to the public.</p> <p>10 Your Honor, Mr. Julian talked at some length about the</p> <p>11 fundamental reasons why Saltzer wants to do this. And I</p> <p>12 won't belabor the point, but I talked about credibility</p> <p>13 earlier today. When we go to the documents, for example, if</p> <p>14 we go to Trial Exhibit 1369, page 16, these are Ms. Powell's</p> <p>15 notes. And the --</p> <p>16 MS. DUKE: Blank out the screen.</p> <p>17 THE COURT: Thank you.</p> <p>18 MR. ETTINGER: Your Honor, she testified about a</p> <p>19 meeting with the Saltzer leadership, and they talked about</p> <p>20 the fundamental reasons for why we should do this. And it's</p> <p>21 about competition, and it's about one -- it's about one</p> <p>22 instead of two, and it's about the amount of money they're</p> <p>23 going to get from contracting. That's the kind of thing</p> <p>24 that Saltzer was considering according to these notes and</p> <p>25 according to its own ordinary-course documents.</p>
<p>3851</p> <p>1 Your Honor, just a few quick comments on remedy. I am</p> <p>2 jumping around just because I get the last word, I guess.</p> <p>3 On the financial incentive point Mr. Wilson addressed,</p> <p>4 I would just quote Your Honor to the <i>Copperweld</i> case, the</p> <p>5 United States Supreme Court in 1984, when the court</p> <p>6 explained in the context of the decision on what constitutes</p> <p>7 a conspiracy, that, quote, "The officers of a single firm</p> <p>8 are not separate economic actors pursuing separate economic</p> <p>9 interests. With or without a formal agreement, the</p> <p>10 subsidiary acts for the benefit of the parent, its sole</p> <p>11 shareholder."</p> <p>12 For antitrust purposes, the Supreme Court has</p> <p>13 recognized you're going to do what's in the interest of your</p> <p>14 parent, whether you're in a subsidiary, whether you're an</p> <p>15 officer, whether you're on a separate negotiating team.</p> <p>16 That's just the economic reality.</p> <p>17 And beyond the issue that Mr. Wilson focused on in</p> <p>18 particular, I would say in terms of the private plaintiffs'</p> <p>19 case, there are special concerns. And that is you would</p> <p>20 certainly expect whatever negotiating teams exist, that if</p> <p>21 Saltzer is owned by St. Luke's, that referrals are going to</p> <p>22 be made with that in mind. And I'm going to have more to</p> <p>23 say about that as we go on further.</p> <p>24 You would also assume that decisions about what</p> <p>25 networks to be in and not to be in are going to be made with</p>	<p>3852</p> <p>1 that fact in mind. So there is no way you can set up this</p> <p>2 Potemkin village of separate negotiating teams, Your Honor,</p> <p>3 and believe that it's going to achieve independence. The</p> <p>4 incentives just aren't there.</p> <p>5 A couple other things on remedy, Your Honor. Suppose</p> <p>6 you did something like this. How many years would it be in</p> <p>7 place? And then what would happen when those years passed?</p> <p>8 At that point, the eggs are scrambled. At that point, is</p> <p>9 there no remedy at all? And at that point they can do</p> <p>10 whatever they want? It's too late to have another remedy at</p> <p>11 that point.</p> <p>12 There are a lot of good reasons why divestiture is</p> <p>13 imposed, because these other -- these other kinds of</p> <p>14 remedies create a huge series of problems.</p> <p>15 A couple other points, Your Honor, on remedy.</p> <p>16 Mr. Wilson pointed out if the \$8 million that the parties</p> <p>17 agreed to on an unwind would stay with Saltzer is not</p> <p>18 enough, the court can order greater assistance. And the law</p> <p>19 says, Your Honor -- this is in our conclusions of law at</p> <p>20 paragraph 1037 -- that the court has discretion when it</p> <p>21 orders a divestiture to require the divesting party,</p> <p>22 St. Luke's here, to provide assistance to the divested party</p> <p>23 to make sure that it can fully compete effectively. And the</p> <p>24 courts have done that time and time again.</p> <p>25 So if, in fact, Your Honor thought -- we don't think</p>

<p style="text-align: right;">3853</p> <p>1 it's true -- but if Your Honor thought that Saltzer was 2 going to be short something, the answer under the law is: 3 Make St. Luke's give it to them. It's as simple as that. 4 And Your Honor may recall that I asked some Saltzer 5 witnesses during the trial: What's your wish list for 6 St. Luke's assistance if you have got this problem? They 7 demurred; they didn't want to ask for anything. 8 But the fact is, if there is something they need -- 9 again, we don't think so -- the court has the power and I 10 think the duty under the case law to order St. Luke's to 11 provide it. 12 Finally on remedy, Your Honor, paragraph 1062 of our 13 conclusions of law talks about the issue that Mr. Wilson 14 mentioned in terms of future acquisitions. We think that's 15 a very significant issue in this case. It's addressed in 16 detail in the findings. I talked about it briefly today, 17 and it's a standard remedy, and we provide the case law in 18 that paragraph. 19 Let me go on and respond briefly to Mr. Bierig on some 20 of these quality issues. Mr. Bierig said twice that 21 defendants must show that the procompetitive benefits here 22 outweigh the anticompetitive effects. Well, that brings us 23 full circle to my argument, I think. 24 Your Honor, how are you going to do that? How are you 25 going to weigh one against the other and say, "Which is</p>	<p style="text-align: right;">3854</p> <p>1 more?" 2 Mr. Bierig did not respond at all to my invitation, in 3 effect, to say: Explain to us how these so-called 4 efficiencies are going to eliminate anticompetitive effects. 5 If St. Luke's and Saltzer could put it in those terms, could 6 explain how the anticompetitive effects are going to be 7 offset and are going to go away, then somebody could weigh 8 it; say, on balance, prices are not going to go up; on 9 balance, concentration is not going to rise; things like 10 that. But defendants haven't even offered that. 11 So Your Honor would be faced with weighing apples and 12 oranges. And I don't know how you do that, and that's why 13 the antitrust laws don't permit that. 14 Maybe even more importantly, Your Honor, what you're 15 left with is the task of becoming a social engineer. You 16 are left with, under defendant's view, the task of deciding 17 not what the antitrust laws require but what's the best 18 healthcare public policy. What's more important, high 19 prices, high market share, or these quality gains that 20 defendants claim they're going to achieve? 21 Your Honor, number one, I would suggest you do not have 22 the power to do that. Congress hasn't given it to you. 23 They have said: Enforce the antitrust laws. Don't create 24 benign monopolists, and don't weigh things outside of the 25 scope of the antitrust laws, <i>National Society of</i></p>
<p style="text-align: right;">3855</p> <p>1 <i>Professional Engineers and Philadelphia National Bank.</i> 2 Number two, Your Honor, respectfully -- and I have a 3 lot of respect -- this court is not the best-suited entity 4 to create healthcare policy for the United States; I don't 5 think any judge would be sitting in a trial. That's not how 6 it's done. It's a job for the legislature. 7 And so what St. Luke's has given you, at most, is a 8 request for social engineering that goes beyond the law and 9 doesn't make a lot of sense. 10 Judicial restraint, which Mr. Bierig requested, calls 11 for following the law and not going beyond it. 12 One final point on this, Your Honor. And that is, you 13 know, the argument that healthcare is different is not a new 14 one. Defendants have been making that argument -- I may 15 have made it once; I don't remember -- since the 1980s. 16 In the <i>Arizona v. Maricopa</i> case in the 1980s, the 17 Supreme Court rejected it, and they said: Every industry 18 says it's different, but too bad. The antitrust laws apply. 19 Because healthcare has always been an odd animal. There 20 have always been different things going on in it. And that 21 argument has always been rejected at the end of the day. 22 And that's in effect what defendants are arguing. 23 THE COURT: But is it fair -- I'm not talking 24 about healthcare being different, but that every industry is 25 different. And it does seem that when you're trying to</p>	<p style="text-align: right;">3856</p> <p>1 determine what is pro- or what is anticompetitive may depend 2 upon the nature of the industry, whether it's car 3 manufacturers, fast-food operations, the market -- it does 4 make a difference, but the laws still apply. 5 MR. ETTINGER: Well, the law still applies, and 6 that means the principles in the case law that have been 7 developed over the last hundred years still apply, the 8 market share rules still apply, HHI still applies, rules 9 against price fixing still apply, the concern over high 10 prices, supracompetitive prices still apply. 11 So the framework is the same. It's across all 12 industries. And, you know, you have got to look at each 13 industry to see how to apply that framework. But defendants 14 are asking for to you throw out the framework in favor of 15 their view about overriding benefits, and that is what we 16 think is not permitted and not appropriate. 17 Mr. Bierig talked a lot about Kaiser and Geisinger and 18 Intermountain. We already discussed Kaiser. As to these 19 other entities, I think suffice it to say that there was no 20 evidence presented that examined any of these entities in 21 detail and said: This is exactly what they have achieved. 22 We have done a controlled study, and this is why they have 23 achieved it. 24 As Professor Enthoven said, these are all in his gray 25 zone because they're half one thing and half another. So</p>

<p style="text-align: right;">3857</p> <p>1 you really can't draw a conclusion from that.</p> <p>2 Mr. Bierig said that they rely on a large nucleus of</p> <p>3 employed physicians. Well, we have addressed the nucleus</p> <p>4 and core issue, and defendants are unable even to articulate</p> <p>5 what their position is on what that core needs to be here.</p> <p>6 Given that, I don't see how we get any guidance from</p> <p>7 Geisinger or others.</p> <p>8 Mr. Bierig suggested you need a big scale here, but</p> <p>9 again, Dr. Pate admitted we don't have a number we can put</p> <p>10 on that scale. And if you don't have a number you can put</p> <p>11 on it, you can't say it needs a certain market share or a</p> <p>12 certain number of providers. What you're left with is a</p> <p>13 platitude, and platitude cannot create the defense here.</p> <p>14 Mr. Bierig, Your Honor, referred to the <i>Tenet</i> case. I</p> <p>15 would just say briefly, the <i>Tenet</i> case, the Eighth Circuit</p> <p>16 reversed the findings on geographic market. That was the</p> <p>17 main holding of the <i>Tenet</i> case. And along the way, they</p> <p>18 said, "And there may be efficiencies here."</p> <p>19 They did not say, as I think I heard Mr. Bierig</p> <p>20 suggest, that the efficiencies overrode a prima facie case.</p> <p>21 They knocked out the prima facie case in <i>Tenet</i>.</p> <p>22 Your Honor, one more thing on this issue of -- you</p> <p>23 know, Mr. Bierig said, I think: Well, these other things</p> <p>24 have been tried around the country, and they have failed.</p> <p>25 Well, there is no evidence for that. And, indeed,</p>	<p style="text-align: right;">3858</p> <p>1 Dr. Seppi, one of the top medical officers in St. Luke's who</p> <p>2 also wasn't asked to testify, said in his deposition -- he</p> <p>3 produced -- because he was their 30(b)(6) witness on</p> <p>4 quality. He was the company representative on quality who</p> <p>5 they didn't bring in here, Your Honor.</p> <p>6 And maybe the reason they didn't was he produced a list</p> <p>7 of quality advantages. And I went through that list with</p> <p>8 him, and I asked him: Which of these things are being done</p> <p>9 elsewhere in the country?</p> <p>10 And he went down the list. And virtually every single</p> <p>11 one he knew was being done elsewhere. And at page 130,</p> <p>12 lines 13 through 18 of his deposition, I said, "And some of</p> <p>13 these programs around the United States have involved</p> <p>14 independent physicians rather than employed physicians,</p> <p>15 haven't they?"</p> <p>16 And he said, "Both independent and employed physicians,</p> <p>17 correct."</p> <p>18 So Dr. Seppi testified on behalf of St. Luke's that</p> <p>19 these things are working for independent physicians.</p> <p>20 Your Honor, one last point on quality, and then I'm</p> <p>21 going to try to race through some of the private plaintiffs'</p> <p>22 competitive issues. And that is, you know, I talked about</p> <p>23 the Wimpy defense. Mr. Bierig has adopted kind of the</p> <p>24 Wimpy-plus defense.</p> <p>25 What he said was, quote, "It's not clear which road</p>
<p style="text-align: right;">3859</p> <p>1 will lead to the best outcome for patients," close quote.</p> <p>2 So, in essence, what Mr. Bierig is saying: Let's let the</p> <p>3 defendants do what they want to do, let St. Luke's do that.</p> <p>4 And maybe it will work, and maybe it won't. We'll find out</p> <p>5 in five or ten years.</p> <p>6 In the meantime, we will have a dominant player, we</p> <p>7 will have a risk of a monopoly, we will have an antitrust</p> <p>8 violation. That just doesn't make sense.</p> <p>9 In effect, it's like Wimpy saying, "I might pay you a</p> <p>10 dollar Tuesday for a hamburger today." It's even worse.</p> <p>11 And that can't be sufficient, Your Honor.</p> <p>12 Your Honor, one last thing on quality, and that's on</p> <p>13 burden. We believe it is the burden of the defendants to</p> <p>14 prove their claimed efficiencies are verifiable and merger</p> <p>15 specific. That is their burden, and they clearly haven't</p> <p>16 met it.</p> <p>17 Your Honor, briefly, on some of the private plaintiffs'</p> <p>18 issues. Mr. Bierig started out by trying to turn this back</p> <p>19 into a pure foreclosure case. And I addressed this, but I</p> <p>20 want to just hit it real quickly.</p> <p>21 Going, Keely, to slide 2. We've put some slides</p> <p>22 together left over from this morning for our rebuttal case.</p> <p>23 And the point here is Dr. Argue doesn't agree with</p> <p>24 Mr. Bierig's position. He said the test is: Do St. Luke's</p> <p>25 actions diminish substantially the competitive constraint</p>	<p style="text-align: right;">3860</p> <p>1 competitors have on St. Luke's? That's the relevant test</p> <p>2 here. There is no magic percentage of the market. Given</p> <p>3 the situation in this case with St. Luke's dominance, that's</p> <p>4 the test, and that's the test we're applying.</p> <p>5 MS. DUKE: Your Honor, can we put the screen up?</p> <p>6 THE COURT: Yes. Thank you for reminding me.</p> <p>7 MR. ETTINGER: Sorry, Your Honor.</p> <p>8 So going to the next slide, Your Honor, on this issue</p> <p>9 of foreclosure, it's important to start with the law. And</p> <p>10 the law is clear that we don't have to prove it. It's</p> <p>11 actually presumed in the case law that foreclosure will</p> <p>12 occur for the common-sense reason -- relates to what I said</p> <p>13 about divestiture a few minutes ago -- that if a</p> <p>14 manufacturer owns a purchaser, you know, they're going to</p> <p>15 work together, because they have a common financial</p> <p>16 incentive. It's just what you would expect.</p> <p>17 That's what the case law says. And that's why, by the</p> <p>18 way, the two negotiating teams don't work. So one problem</p> <p>19 with St. Luke's argument is it's contrary to a presumption</p> <p>20 in the law.</p> <p>21 When you read the vertical merger cases, for example,</p> <p>22 they rarely even discuss whether there is foreclosure. They</p> <p>23 assume there is foreclosure. In this case, maybe I made a</p> <p>24 big mistake in December when I presented all this evidence</p> <p>25 of foreclosure and then we started arguing about it, because</p>

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1 it's not even our burden. Having said that, we have more
 2 than met our burden, Your Honor.
 3 Indeed, going to the next slide, Your Honor, St. Luke's
 4 has admitted it. This is one proposed finding of
 5 St. Luke's, and this is -- this comes directly from
 6 Dr. Argue. And their point is -- because they were trying
 7 to argue the criminal loss is smaller. Their point is that
 8 if a St. Luke's primary care physician gets more patients,
 9 St. Luke's gets more lab work, more imaging work, more
 10 inpatient work, more outpatient work.
 11 Well, gee, that's what I've been saying since December.
 12 And they say it themselves, that if they own the doctor,
 13 they are going to get the hospital cases. And Dr. Argue has
 14 said it now, and St. Luke's has made what may be a judicial
 15 admission, Your Honor, on the same point.
 16 But that's not all, Your Honor. Going to the next
 17 slide, you know, there, is a host of different kinds of
 18 evidence to prove foreclosure: testimony, documents, and
 19 the data. And I'm going to get to the data.
 20 Going on real quickly, the next slide, 6, may be AEO.
 21 Why don't we skip by it. But there is a whole series of
 22 documents that show that St. Luke's expected the Saltzer
 23 doctors to refer there, and the Saltzer doctors expected to
 24 refer there, and they were told to refer there.
 25 And we present here the findings of fact on that, but

1 there is a host of evidence. And if we had nothing else,
 2 that alone would prove the foreclosure case.
 3 But let's go to some of the data, Your Honor. It's in
 4 the findings. I don't want to do all of it, but I do want
 5 to go to the chart that Mr. Bierig put up. Because this is
 6 a -- this chart is sleight of hand squared, Your Honor. And
 7 I think it's very important to realize that.
 8 Mr. Bierig said this shows no significant decline in
 9 cases that go to -- that go to Saint Alphonsus facilities
 10 from primary care doctors.
 11 Well, number one, it's got nothing to do with
 12 facilities. It's about referrals to specialists. But,
 13 number two, Your Honor, if you look at -- take a look at
 14 those percentages. The dark blue, the first column, is
 15 before these groups are acquired.
 16 And you may be saying, as I did when I first looked at
 17 this chart: Why are they so low? Why is it that Mercy
 18 Physicians Group, Inc., the group on the far right, which
 19 was a SAMG group, was only making 5 percent of its specialty
 20 referrals to Saint Alphonsus specialists? Something must be
 21 wrong here.
 22 Well, Your Honor, you know what's wrong? This has only
 23 got referrals to the employed specialists at SAMG, but most
 24 of the doctors who admit patients at Saint Alphonsus
 25 facilities are independent doctors. And this chart doesn't

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1 show any of it. All it shows is that narrow sliver of SAMG
 2 specialists.
 3 And, sure, the change is small, because the numbers are
 4 tiny to start with. But if you go to the underlying Argue
 5 exhibits, 2464 and 2465, what you find is there is a
 6 significant drop in absolute numbers and a real drop in
 7 percentage numbers in the cases that go to independent
 8 specialists from these St. Luke's PCPs after they're
 9 acquired, and there is a big increase in the numbers that go
 10 to the St. Luke's specialists, about 40 percent.
 11 So when you go under the hood of this data, you find
 12 that it proves exactly the opposite of what St. Luke's was
 13 trying to suggest, Your Honor. And I think it becomes
 14 consistent with all those charts from Professor Haas-Wilson
 15 that we have shown and --
 16 THE COURT: So are you saying that the referrals
 17 here are the referrals pre and post acquisition by the
 18 primary care physicians to employed physicians at Saint
 19 Alphonsus?
 20 MR. ETTINGER: Yes, Your Honor. Except it's less
 21 than that. Because, as you recall, the data that Dr. Argue
 22 used couldn't tell you who referred anything. These are
 23 just patients who happened to have these PCPs who happened
 24 to use these doctors, which is yet another problem with the
 25 data that we have spent a lot of time on.

1 THE COURT: Right. That was the hospitalists?
 2 MR. ETTINGER: No. This is the issue where I may
 3 self-refer to the specialist. I may have been referred to
 4 the specialist by the PCP three years before, but I happened
 5 to visit him after the acquisition.
 6 THE COURT: But what you're saying is, regardless,
 7 the percentage of patients referred to a St. Luke's
 8 specialist post acquisition did go up considerably?
 9 MR. ETTINGER: Yes. That's what the exhibits
 10 show, Your Honor.
 11 THE COURT: All right.
 12 MR. ETTINGER: So going on to slide 10,
 13 Your Honor, you know, if there is any issue about this
 14 referrals to specialists, we have got lots of testimony that
 15 says the doctors get acquired, and they shift their
 16 referrals to specialists. There is no doubt about this. It
 17 makes perfect sense.
 18 The next slide, Your Honor, this one you have seen from
 19 Professor Haas-Wilson. And this illustrates the point --
 20 the other flaw in the defendant's strategy that we were just
 21 talking about, which is that, again, the referral to the
 22 specialist could have happened long before the acquisition.
 23 But the way they look at the data, Dr. Argue and Ms. Ahern,
 24 if it happens that there is a visit to a specialist after
 25 the acquisition, it looks like something has changed, when

<p style="text-align: right;">3865</p> <p>1 the relevant action by the PCP could have been years ago.</p> <p>2 So it doesn't really tell you much, doesn't tell you</p> <p>3 anything at all, Your Honor. And that's a problem with</p> <p>4 Dr. Argue's and Ms. Ahern's data but not with the admitting</p> <p>5 data, which Professor Haas-Wilson relied on.</p> <p>6 Your Honor may remember the admitting data, everybody</p> <p>7 agrees, doesn't catch every case because of the</p> <p>8 hospitalists, for example, but it's conservative.</p> <p>9 Which brings us to the next slide, Your Honor.</p> <p>10 Professor Haas-Wilson found -- and Ms. Ahern had essentially</p> <p>11 the same numbers; she pulled a 40 percent number off a</p> <p>12 Saint Al's document -- that 47 percent of the Saint</p> <p>13 Alphonsus Nampa admissions, 55 percent of the neuro or</p> <p>14 orthopedic surgeries were from -- were with patients who had</p> <p>15 a PCP who works at Saltzer.</p> <p>16 So if you believe the Argue-Ahern approach, you would</p> <p>17 say to yourself: Boy, Saint Al's Nampa is really</p> <p>18 vulnerable. Half their patients could go.</p> <p>19 Now, Mr. Checketts' projections -- I'm not going to go</p> <p>20 into them in detail because there is no time -- he used,</p> <p>21 Your Honor may recall, admissions. He used the lower, more</p> <p>22 conservative number, and he found a huge problem.</p> <p>23 So either way you slice it, Your Honor, there is going</p> <p>24 to be a huge problem here, whether you use the PCP data or</p> <p>25 you use the admissions data.</p>	<p style="text-align: right;">3866</p> <p>1 And as you recall, Your Honor, one thing Mr. Checketts</p> <p>2 said beyond the projections that is undeniable. And that is</p> <p>3 those marginal patients, gaining or losing them goes</p> <p>4 straight to the bottom line.</p> <p>5 So if half your patients are at risk, even if you lose</p> <p>6 any sizeable chunk of them, you're in trouble; you're going</p> <p>7 into the red, and you're going to have the kinds of problems</p> <p>8 that we have talked about.</p> <p>9 So, Your Honor, I think the data, on top of all the</p> <p>10 other evidence of referrals, is very strong on foreclosure</p> <p>11 on top of all the other elements that show harm to</p> <p>12 competition.</p> <p>13 Your Honor, finally, I'll skip over slide 13. The</p> <p>14 Barry case is a case that St. Luke's cited. It's about</p> <p>15 procompetitive foreclosure because lower prices were part of</p> <p>16 the deal. So it's irrelevant here.</p> <p>17 But to go to slide 14, Your Honor, Mr. Bierig suggested</p> <p>18 that Saint Al's can replace the lost referrals. Well, the</p> <p>19 fact is, if you look at Saltzer, there is lots of evidence</p> <p>20 on this, and it cannot. It can't recruit on the scale of</p> <p>21 Saltzer. Nobody has suggested you could. They have added</p> <p>22 no pediatricians, no internists, and a few family practice</p> <p>23 doctors who can't get busy because Saltzer is too popular.</p> <p>24 There is nobody else to buy in Nampa. The expansion</p> <p>25 Mr. Bierig talked about is built into Mr. Checketts'</p>
<p style="text-align: right;">3867</p> <p>1 projections, and they still show a big loss. And the</p> <p>2 further relocation, the phase 2 program, the evidence shows</p> <p>3 it's in jeopardy if this transaction occurs because that</p> <p>4 \$200 million will not be spent.</p> <p>5 THE COURT: Mr. Ettinger, your time is up, and we</p> <p>6 did add in time that the -- so I'll give you just a few</p> <p>7 minutes to wrap up.</p> <p>8 MR. ETTINGER: Okay. Your Honor, the last slide I</p> <p>9 was going to do -- and Mr. Powers -- was about Treasure</p> <p>10 Valley. And let me make one quick point on that, and I'll</p> <p>11 wrap up, Your Honor.</p> <p>12 The quick point is this: St. Luke's tries to argue</p> <p>13 that there was no harm to Treasure Valley by combining</p> <p>14 Treasure Valley's numbers with Treasure Valley Surgery</p> <p>15 Center's numbers. The problem with that is, until about a</p> <p>16 year ago, Treasure Valley Surgery Center didn't exist.</p> <p>17 Treasure Valley Surgery Center is in a different place,</p> <p>18 Nampa, significant part, different doctors, different</p> <p>19 procedures. And the goal was to get substantially more</p> <p>20 business. The fact is that as compared to projections,</p> <p>21 netting out the common doctors, they're down 800.</p> <p>22 So Treasure Valley Hospital has been hurt. And</p> <p>23 Mr. Genna has testified, even more importantly, that that</p> <p>24 primary care base is shrinking. And he critically depends</p> <p>25 on just a couple of doctors who, if they go -- because</p>	<p style="text-align: right;">3868</p> <p>1 they're worried about the Saltzer PCP referrals -- will</p> <p>2 leave him in serious trouble.</p> <p>3 So we think all the prongs of anticompetitive effect</p> <p>4 have been shown here, Your Honor. Thank you.</p> <p>5 THE COURT: All right. Thank you.</p> <p>6 Well, Counsel, I guess this is my last chance to</p> <p>7 address you. I want to echo the comments that have been</p> <p>8 made in terms of the very interesting nature of the</p> <p>9 proceeding and also the quality of the lawyering.</p> <p>10 I think I may have alluded to that when we concluded</p> <p>11 the evidence, but I can't think of a time when I've had this</p> <p>12 level of consistently first-rate lawyering just across the</p> <p>13 board. It has been a delight from that point of view.</p> <p>14 Writing a decision, perhaps not so delightful. It</p> <p>15 truly is going to be a daunting challenge. But we are going</p> <p>16 to work on it hard and aggressively. I am back in trial, so</p> <p>17 I'm going to have to be working on it in bits and pieces.</p> <p>18 But I'm hopeful that within a few weeks, we'll have a</p> <p>19 decision. I don't want to promise specifics, but that's</p> <p>20 going to be our objective, and we will be working on it.</p> <p>21 Again, I just cannot say enough about the quality of</p> <p>22 the lawyering, and it does make this job truly delightful</p> <p>23 when I know each morning -- even though I know it may be a</p> <p>24 little contentious from time to time, I know that it's going</p> <p>25 to be just first rate in terms of the skills of the</p>

<p style="text-align: right;">3869</p> <p>1 attorneys and, frankly, the challenge of the issue itself.</p> <p>2 Because it seems like we're thrust right into the middle of</p> <p>3 a debate which really may be one of the two or three most</p> <p>4 significant challenges, both economic, social, and what have</p> <p>5 you, that our country is facing.</p> <p>6 And, of course, we're focused just on the Treasure</p> <p>7 Valley. But I think it -- it clearly has to be viewed</p> <p>8 through this kind of broader -- with this broader</p> <p>9 perspective and understand where we are.</p> <p>10 And while I don't want to suggest that healthcare is</p> <p>11 different, Mr. Ettinger, all I was -- what I was alluding to</p> <p>12 and I think is true is that we do have to look at -- again,</p> <p>13 I have a number of antitrust cases. Seems like right now</p> <p>14 I'm just handling quite a number of those cases, but I think</p> <p>15 competition means something a little different in every</p> <p>16 sector of the economy.</p> <p>17 I don't think healthcare is any different, and it</p> <p>18 shouldn't be treated any different. The laws apply the same</p> <p>19 way. But I think when we analyze competitive effects and</p> <p>20 anticompetitive effects, procompetitive effects, it does</p> <p>21 require that we be mindful of how the market works in a</p> <p>22 particular sector of the economy.</p> <p>23 That doesn't -- by saying that, I'm not in any way</p> <p>24 suggesting what the decision will be, only that I think this</p> <p>25 is a challenging issue that's going to require some very</p>	<p style="text-align: right;">3870</p> <p>1 serious thought and reflection.</p> <p>2 We will hopefully have a written decision out in fairly</p> <p>3 short order. If I feel the need to invite further briefing,</p> <p>4 it will be very narrow, very focused on just a couple of</p> <p>5 issues that I'm not clear about. And when -- that may</p> <p>6 happen -- if that does occur, you may have a very short</p> <p>7 turn-around time, just a few days, because it means that</p> <p>8 we're hung up on something and we want that to help us kind</p> <p>9 of wrap up the final product.</p> <p>10 In any event, we'll take the matter under advisement,</p> <p>11 issue a written decision in due course. And we will be in</p> <p>12 recess.</p> <p>13 (Proceedings concluded at 3:59 p.m.)</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
<p>1 <u>REPORTER'S CERTIFICATE</u></p> <p>2</p> <p>3</p> <p>4</p> <p>5 I, Tamara I. Hohenleitner, Official Court Reporter,</p> <p>6 County of Ada, State of Idaho, hereby certify:</p> <p>7 That I am the reporter who transcribed the proceedings</p> <p>8 had in the above-entitled action in machine shorthand and</p> <p>9 thereafter the same was reduced into typewriting under my</p> <p>10 direct supervision; and</p> <p>11 That the foregoing transcript contains a full, true,</p> <p>12 and accurate record of the proceedings had in the above and</p> <p>13 foregoing cause, which was heard at Boise, Idaho.</p> <p>14 IN WITNESS WHEREOF, I have hereunto set my hand</p> <p>15 November 11, 2013.</p> <p>16</p> <p>17</p> <p>18</p> <p>19 _____</p> <p>20 Tamara I. Hohenleitner</p> <p>21 Official Court Reporter</p> <p>22 CSR No. 619</p> <p>23</p> <p>24</p> <p>25</p>	